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July 31

**REPORTS**  
**OF**  
**CASES AT LAW AND IN CHANCERY**

**ARGUED AND DETERMINED IN THE**  
**SUPREME COURT OF ILLINOIS.**

---

**VOLUME 265.**  
**CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER**  
**AND DECEMBER, 1914, AND CASES WHEREIN REHEARINGS**  
**WERE DENIED AT THE DECEMBER TERM, 1914.**

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**SAMUEL PASHLEY IRWIN,**  
**REPORTER OF DECISIONS.**

---

**BLOOMINGTON, ILL.**  
**1915.**



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# JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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ATTORNEY GENERAL,

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REPORTER OF DECISIONS,

SAMUEL PASHLEY IRWIN.

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CLERK,

CHARLES W. VAIL.\*

---

\*At the general election held November 3, 1914, Charles W. Vail was elected clerk of the Supreme Court for the full term of six years.



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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF ILLINOIS.**

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in  
Error, *vs.* NIKOLA GAVRILOVICH, Plaintiff in Error.

*Opinion filed October 16, 1914.*

1. CRIMINAL LAW—*paragraph 285 of Criminal Code was not intended to abrogate the common law rule as to insane defendant.* Paragraph 285 of the Criminal Code, providing that when a person becomes insane after the commission of the crime he shall not be tried for the offense during the continuance of the insanity, was not intended to abrogate the common law rule that no person can be compelled to plead to a criminal charge and be placed on trial for the crime while insane.

2. SAME—*limits of inquiry where question of defendant's sanity is tried as a preliminary issue.* Where a trial is ordered to determine the question of the sanity of a defendant who is claimed to be insane at the time he is to be arraigned on a criminal charge, the inquiry is limited to the question whether he is insane at the time of the empaneling of the jury, and it is beyond the province of the jury to find that he has become insane since the commission of the crime.

3. SAME—*when admission of a verdict in insanity trial is reversible error.* Where the only defense in a murder trial is the insanity of the defendant when the crime was committed, it is reversible error to admit in evidence the verdict of a jury on the question of the defendant's sanity at the time he was to be arraigned on a former trial on the same charge, which verdict con-

tains a finding that the defendant had become insane since the commission of the crime.

4. SAME—*qualified expert may state his opinion as to how long insanity had existed.* A qualified expert on insanity who has examined the defendant in a murder trial should be permitted to state his opinion, if he has one, as to how long the insanity of the defendant had existed prior to the time the witness made his examination.

WRIT OF ERROR to the Circuit Court of Madison county; the Hon. LOUIS BERNREUTER, Judge, presiding.

M. R. SULLIVAN, MORGAN LEMASTERS, and C. C. ELLISON, for plaintiff in error.

P. J. LUCEY, Attorney General, J. M. BANDY, State's Attorney, and D. E. DETRICH, (GEORGE P. RAMSEY, of counsel,) for the People.

Mr. JUSTICE FARMER delivered the opinion of the court :

Plaintiff in error was indicted at the May term, 1910, of the Madison county circuit court for the murder of his wife. The indictment charged plaintiff in error committed the murder by cutting and stabbing his wife with a large knife, April 3, 1910. Shortly after the homicide plaintiff in error was arrested and committed to jail. In November, 1910, and before plaintiff in error was required to plead to the charge of murder, it was represented by his counsel to the presiding judge of the circuit court that he was insane and a request made for a trial upon that issue. The request was granted, a trial had and the following verdict returned November 9: "We, the jury, find Nikola Gavrilovich, the one on trial, has become insane since he committed the crime of murder for which he has been indicted, and that he is insane at this time and was at the time of empaneling the jury." Plaintiff in error was thereupon by the judgment of the court committed to the asylum for insane criminals at Chester, Illinois, there to remain until the

superintendent of said asylum should certify to the court that he had been restored to reason, whereupon he should be returned to the county jail of Madison county for disposition of the charge of murder pending against him in that court. Plaintiff in error was accordingly taken to said asylum for insane criminals, where he remained until April 14, 1913, when he was discharged as restored to reason and was again placed in confinement in the county jail of Madison county. January 26, 1914, on motion of the State's attorney, a jury was empaneled to inquire into the sanity of plaintiff in error. Counsel for plaintiff in error in this case represented him on the trial of that issue. The jury returned this verdict: "We, the jury, find the defendant, Nikola Gavrilovich, at the present time sane." Thereafter plaintiff in error was arraigned, pleaded not guilty to the crime charged and was put upon his trial for said crime. He was found guilty by the jury and his punishment fixed at death. The court overruled a motion for a new trial and sentenced him to be executed. The record is brought here for review on a writ of error granted by this court, which was made a *supersedeas*.

It was not denied that plaintiff in error killed his wife by stabbing her with a large knife. The killing was done in a most cruel and brutal manner. Plaintiff in error and his wife had not been living together for some time prior to the homicide. Testimony was introduced on his behalf that his wife was unfaithful to him, and that for some time prior to their separation their relations were stormy and very inharmonious. The defense was that plaintiff in error became insane and was insane at the time of the homicide. Witnesses called on his behalf testified to acts and conduct on his part of an irrational character for some time prior to the homicide.

Dr. Anderson, superintendent of the asylum for insane criminals at Chester, first saw plaintiff in error November 17, 1910, when he was received in the asylum. He testi-



fied he was then insane but gradually improved until he was returned to the Madison county jail as restored to reason. He was asked, from the history of the case, the appearance and condition of the patient and the examination and tests made by him, whether it was possible to determine what was the probable duration of the insanity. The doctor answered he could tell to his own satisfaction whether it had just come on or had existed for some time. He was then asked how long, in his opinion, at the time he first saw plaintiff in error, his insanity had existed. He answered the patient's type of insanity required a preceding period of development; that this period might be months in duration or might be years; that it was impossible to fix the bounds of the preceding period. On motion of counsel for the State the answer was stricken out as too indefinite and uncertain. The doctor testified plaintiff in error's insanity was of the paranoia type, which requires time to develop and as a rule is incurable.

Dr. Fiegenbaum testified, on behalf of plaintiff in error, that he saw him in June, 1910. He also saw him from four to six weeks prior to that time but could not fix the exact date. The doctor visited the jail where plaintiff in error was confined, as a member of a commission appointed by the Governor. The doctor testified he had for several years made insanity, in all its phases and classifications, a special study. He examined plaintiff in error closely on both his visits to the jail and found him insane. He classified his insanity as paranoia and was of opinion he was incurable. Counsel for plaintiff in error offered to prove by the witness, from examinations made by him in May and June following the commission of the crime and from the history the witness obtained, that in his opinion plaintiff in error was insane at the time of the homicide. This was objected to and the objection overruled, but the witness said he could not answer the question put in that way, and the question remained unanswered. The witness testified

plaintiff in error was "crazy as a bed-bug" when he saw him in the jail and did not then know right from wrong.

In rebuttal the State offered the testimony of lay witnesses tending to show that plaintiff in error was not insane at the time of the commission of the crime. The State also offered in evidence the verdicts and judgments in the two trials of the question of plaintiff in error's sanity. These were objected to by counsel for plaintiff in error, but the objections were overruled and the records admitted in evidence. These rulings of the court and the rulings sustaining objections to questions asked of the medical witnesses by counsel for plaintiff in error are the principal and material objections urged for reversal of the judgment. We are of opinion the admission of the records of the two trials upon the question of plaintiff in error's sanity was erroneous, and the verdict in the first trial of that issue was especially prejudicial.

By paragraph 284 of the Criminal Code (Hurd's Stat. 1913, p. 865,) it is provided that if upon the trial of one charged with crime it appears he was insane when the crime was committed the jury shall so find by their verdict, and shall also find whether he has entirely and permanently recovered. If he has not, he will be committed to the State hospital for the insane, to be kept there until fully and permanently restored. If he was insane when the crime was committed but has fully recovered he must be discharged. Paragraph 285 provides that when a person becomes insane after the commission of a crime he shall not be tried during the continuance of his insanity. If he becomes insane after a verdict of guilty and before judgment no judgment shall be rendered on the verdict during the continuance of the insanity. If after judgment and before execution of the sentence he becomes insane, in case the punishment is capital the execution shall be stayed until the prisoner recovers from insanity. "In all of these cases it shall be the duty of the court to empanel a jury to try the

question whether the accused be, *at the time of empaneling*, insane or lunatic."

The rule at common law was, that an insane person could not be required to plead to an indictment and be placed on his trial for the crime charged. In *Freeman v. People*, 4 Denio, 9, (47 Am. Dec. 216,) the court, in discussing this question, after citing Sir Edward Coke and Blackstone's Commentaries, said: "The true reason why an insane person should not be tried is, that he is disabled by an act of God to make a just defense if he have one. As is said in 4 Hargrave's State Trials, 205: 'There may be circumstances lying in his private knowledge which would prove his innocency, of which he can have no advantage, because not known to the persons who shall take upon them his defense.' The most distinguished writers on criminal jurisprudence concur in these humane views, and all agree that no person in a state of insanity should ever be put upon his trial for an alleged crime or be made to suffer the judgment of the law. A madman cannot make a rational defense, and as to punishment, *furiosus solo furore punitur*. (1 Hale's P. C. 34, 35; 4 Blackstone's Com. 395, 396; 1 Chitty on Crim. Law,—ed. 1841—p. 761; 1 Russell on Crimes,—ed. 1845—p. 14; Shelford on Lunacy, 467, 468; Stock on Non-Comp. 35, 36.) The statute is explicit that 'no insane person can be tried,' but it does not state in what manner the fact of insanity shall be ascertained. That is left as at common law; and although, in the discretion of the court, other modes than that of a trial by a jury may be resorted to, still in important cases that is regarded as the most discreet and proper course to be adopted. See the authorities last referred to, also 1 Hawkins' P. C. (by Curwood,) p. 3, and note; Stephen on Crim. Law, 3, 4, 280, 334." In the State of New York the statute contained an express provision that no insane person could be tried while he continued insane, but the court said this was no introduction of a new rule but was

in strict conformity with the common law on the subject. In *State v. Harrison*, 36 W. Va. 729, (18 L. R. A. 224,) it was said statutes providing that no one, while insane, shall be tried for crime are only declaratory of the common law. See, also, *French v. State*, 93 Wis. 325; *United States v. Youtsey*, 91 Fed. Rep. 864.

Our statute does not expressly declare that no one shall be tried for a criminal offense while he is insane, but the provision of paragraph 285 that where a person becomes lunatic or insane after the commission of the crime he shall not be tried for the offense during the continuance of the insanity is not and was not intended to be an abrogation of the common law that no person can be compelled to plead to a criminal charge and be placed on trial for the crime while insane. The grounds for this rule of the common law, and for statutes where it has been expressly declared by statute, are very well stated in *Freeman v. People*, *supra*. It has been held in a number of decisions that where it was claimed on behalf of a person who has been indicted for crime that he was insane when the time came for him to be arraigned and called upon to plead, the court might exercise some discretion, in view of the known circumstances and condition of defendant, in determining whether the issue of insanity should be first tried before the defendant should be required to plead and be placed upon his trial for the crime. (*Jones v. State*, 13 Ala. 153; *State v. Reed*, 41 La. Ann. 581; *State v. Harrison*, *supra*.) When the trial is ordered for the purpose of determining the defendant's sanity the inquiry is confined to his sanity at the time of the trial upon that question, for the purpose of determining whether he is sane and has the capacity to make a rational defense. His mental condition at the time of the commission of the alleged crime is foreign to the inquiry. That question is only competent to be considered and passed upon when the accused is placed upon his trial for the alleged crime. The provision of paragraph 285 of

our Criminal Code that where a jury is empaneled, before the accused is placed upon his trial, to determine the question of his sanity the inquiry is to be whether he was at the time of empaneling the jury insane, is applicable in all cases where the sanity of the accused is tried as a preliminary issue to his being placed on trial for the crime he is charged with. Even in a case where it is not claimed that the accused was insane at the time the crime was committed but where the claim is he has since the commission of the alleged crime become insane, the statute expressly limits the inquiry to the accused's mental condition at the time of empaneling the jury, and in such case the inquiry into and finding as to what his mental condition was previous to the trial upon the question of his sanity are unauthorized and improper. The purpose of the inquiry is to determine whether the accused is then in a mental condition that would justify his being placed on trial for the crime. The verdict of the jury in the trial of the preliminary issue, in November, 1910, which was admitted in evidence, did not expressly find that plaintiff in error was sane at the time of the commission of the alleged crime, but found that he had become insane since that time and was so insane at the time of the empaneling of the jury. This verdict was admitted as evidence to rebut the proof of plaintiff in error that he was insane at the time of the homicide. For the reasons stated it was incompetent. No one can say how much weight was given to it by the jury in this case, but it was of a character well calculated to cause the jury to attach great weight to it and make a serious impression prejudicial to plaintiff in error's defense. Clearly it did not fall within that class of errors that can be said to be harmless. The only defense of plaintiff in error was that the homicide was committed when he was insane, and upon that question he was entitled to a fair trial under competent evidence. It was irrelevant to the determination of plaintiff in error's guilt or innocence upon

his trial for the crime charged whether he had been adjudged insane since its commission and had at a subsequent period been adjudged sane, and we are of opinion that the verdict and judgment in neither of the trials for insanity were competent evidence. Whether, if the inquiry had been confined to plaintiff in error's mental condition at the time of those trials, the admission in evidence of the findings and verdicts would constitute reversible error we do not determine, but in view of the fact the verdict on the first trial for insanity states that plaintiff in error had become insane after the commission of the crime, and would be taken to warrant the inference that he was sane at the time of its commission, such admission must be held reversible error, especially in a case where the death penalty is fixed.

We are also of opinion the court erred in refusing to permit Dr. Anderson, who qualified as an expert on the subject of insanity, to express his opinion as to how long the insanity of plaintiff in error had existed prior to his seeing and examining him. This question was passed upon by the court in *Freeman v. People, supra*. In that case the alleged crime was committed in March, and medical witnesses who examined the accused in July following were not permitted to testify, from such examinations, whether, in their opinion, he was insane at the time of the commission of the alleged crime. Upon that question the court said: "And I entertain no doubt that such a witness should be allowed to express an opinion in regard to the mental condition of a person alleged to be insane in the month of March although the opinion may have been founded solely on an examination made in the succeeding July. In most cases, undoubtedly, the opinion would be more satisfactory and convincing when based on observations made at or about the time to which the inquiry relates. But this is not decisive against the reception of such evidence though founded on examinations made at a later period. The com-



petency of the testimony is one question and its effect another. The first is for the court and the latter for the jury. It will sometimes, undoubtedly, be found, and perhaps not unfrequently, that the mental malady is such that an examination would disclose, beyond all peradventure, to a skillful physician, what must have been the condition of the patient for months or years before. The lateness of the time when the examination was made, as well as the character of the malady, are certainly to be considered in determining the degree of consequence which should be given to the opinion of the witness, but unless the intervening time is much greater than from March to July that can furnish no solid objection to the admissibility of the evidence. If I could, therefore, adopt the suggestion that the sixth of July was taken by the court as a reasonable limitation to inquiries of this description, I should still be unable to agree that the court had a right to impose any such restriction upon the witnesses. It was competent for such witnesses to state what their opinions were, whether founded upon examinations before or during the trial; and these opinions might not only extend to the mental condition of the prisoner at the time when the homicide was perpetrated, but they might be brought down to the very time when the witness was speaking."

No error was committed in the rulings upon the examination of Dr. Fiegenbaum. The court overruled an objection to the question put to him whether, from his examinations of plaintiff in error on the two occasions he visited him in the jail together with the previous history he had of the case, he was of opinion plaintiff in error was insane at the time of the homicide, but the doctor declined to answer the question put in that form.

For the errors mentioned the judgment will be reversed and the cause remanded.

*Reversed and remanded.*

JANE M. JOHNS *et al.* Appellees, *vs.* ROBERT R. MONTGOMERY, Trustee, Appellant.

*Opinion filed October 16, 1914.*

1. **EQUITY**—*court of equity has jurisdiction to modify terms of trust.* A court of equity has jurisdiction to modify the terms of a trust where unforeseen conditions have arisen which require such modification in order to preserve the trust estate to beneficiaries.

2. **SAME**—*what facts authorize modification of terms of trust.* The terms of a trust requiring the trust estate to be held and operated for agricultural purposes is properly modified by authorizing the subdivision of the land into lots and blocks and the sale thereof, where, by reason of the growth of an adjacent city and the contemplated expensive street improvements which must be paid for by the trust estate, the entire estate will be lost to the beneficiaries unless the terms of the original trust are so modified.

APPEAL from the Circuit Court of Macon county; the Hon. WILLIAM G. COCHRAN, Judge, presiding.

OUTTEN, EWING, McCULLOUGH & WIERMAN, for appellant.

WILLIAM C. JOHNS, for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court :

In this case a bill was filed by the beneficiaries under a trust deed executed in 1860 by William Martin for the purpose of securing a modification of the terms of a trust. The trust deed conveyed the south-east quarter of section 14, township 16, range 2, east of the third principal meridian, in Macon county, Illinois, to Harvey C. Johns for the following purposes expressed in the deed :

"To receive the rents, issues and profits and proceeds annually arising out of said estate and premises, and after paying all taxes and assessments of every nature and description, proper charges on the same, and after reserving a reasonable compensation to himself for the faithful performance of the duties herein expressed, to appropriate the

balance of the rents, issues and profits in the manner following: To the support and maintenance of said Jane Johns during her lifetime and to the support and education of William C. Johns, Fannie Johns, Helen Johns, Sheridan Johns, and such other child or children, if any there be, that may be born of said Jane Johns by her husband, Harvey C. Johns, and after amply providing for the uses and purposes aforesaid, the profits, if any, shall be expended in improving the real estate and premises aforesaid in such manner as shall be deemed most beneficial to the parties interested therein by said party of the second part, but no debts shall be incurred for the improvement of said real estate for which said real estate, or the proceeds arising therefrom, is to be chargeable. Said real estate is at all times to be free and unencumbered, and the proceeds annually arising therefrom are to be appropriated to the uses hereinbefore specified in each and every year during the lifetime of said Jane Johns, and until the youngest child of said Harvey C. Johns and Jane Johns hereinbefore named or hereafter to be born shall attain the age of twenty-one years. Said Harvey C. Johns, during the continuance of the trust herein reposed, is to have the privilege of occupying said premises and real estate, but during the time of said occupancy the proceeds arising therefrom are to be disposed of as hereinbefore designated, and after the death of said Jane Johns, wife of Harvey C. Johns, and after the youngest of the children of Jane and Harvey C. Johns hereinbefore named or hereafter to be born shall arrive at the age of twenty-one years, said real estate and premises are to be divided equally among such children of said Harvey C. Johns and Jane Johns. And in case of the death of any of said children leaving issue, then the descendant or descendants of such deceased child or children shall receive the share to which their parent would be entitled if living; and if none of the children now living or hereafter to be born, of said Harvey C. Johns and Jane Johns,

shall attain the age of twenty-one years, or if all said children shall die without leaving issue, and after the death of the said Jane Johns, then said real estate shall vest in said Harvey C. Johns, if he then be living, for and during the term of his natural life, and upon the death of said Harvey C. Johns such real estate and all the premises herein granted shall revert and be re-invested in said party of the first part, his heirs or legal representatives. And it is further provided that if said Harvey C. Johns shall depart this life previous to the complete fulfillment of the trust reposed in him, then the judge of the Macon county circuit court, or if there be no such court at that time then the court having highest jurisdiction in said Macon county, shall appoint a trustee for the faithful performance of the matters and duties herein designated and will supervise the acts and doings in the premises of the trustee so appointed."

After the making of said trust deed one other child was born to Harvey C. and Jane M. Johns, and that child married and died leaving no child or children surviving her, and her husband has since died. Fannie Johns was married and died leaving one child, Harvey J. Sedgwick, who is one of the complainants in this action. All of the other children of Jane M. Johns and Harvey C. Johns, except William C. Johns, who has died since this cause was submitted, are still living and are parties to this proceeding.

In 1898, during the lifetime of Harvey C. Johns, Jane M. Johns filed a bill for the purpose of having the terms of the trust modified, and the circuit court of Macon county entered a decree granting the relief prayed for. A writ of error was sued out of this court to obtain a review of the decree, and upon a consideration of the record the decree was reversed and the cause remanded. This court having decided the merits of the controversy against the complainant, the bill was dismissed after the cause was remanded to the circuit court. The present bill relates to the same subject matter, concerns the same parties and seeks

the same relief that was prayed for in the bill in the former case. No question of *res judicata* is involved, for the reason that the circumstances of the property have materially changed since the former case was decided. Several important new facts are presented in the present case which have arisen since the former case was disposed of. On the former hearing the controlling fact relied upon for a modification of the trust deed was, that the property, by reason of its proximity to the city of Decatur, had so increased in value that it would be much to the advantage of the beneficiaries to subdivide and sell the property and invest the proceeds in some safe interest-bearing securities, but this court decided that the mere circumstance that a modification of the trust would be advantageous to the beneficiaries was not a sufficient reason to warrant a court of equity in decreeing a modification of the trust agreement contrary to the clearly expressed will of the donor. The tract of land involved in this trust at the time the deed was made was in the suburbs of the city of Decatur. At that time the best use to which it could be put was for agricultural purposes. It appears from the bill, the evidence and findings of the court, that the city of Decatur has extended its boundaries and increased in population so that at present the land in question is almost, if not totally, surrounded by the inhabited portion of the city of Decatur and is now within the city limits. It is shown that there are 637 houses and 2498 inhabitants living within two blocks of said premises, and that as a result its usefulness as a farm has decreased while its general value has materially advanced. It also appears that in its present situation the only use to which the premises can be put is for pasturage, and that the income therefrom for such purpose is wholly insufficient to defray the taxes and other necessary expenses of maintaining the premises. It also appears that the city authorities are contemplating proceedings for special street and sidewalk improvements, and for

a large sewer which will pass entirely through the tract, and other local improvements are under contemplation which will have to be paid for by special assessment or special taxation, and from the evidence it is shown that the special taxes levied upon the trust property for these various local improvements will be from \$100,000 to \$140,000, and that there is no source of income from which these burdens can be paid under the existing terms of the trust, and that if the trust deed is not modified the result will be the complete destruction of the trust estate and its total loss to the beneficiaries. These facts are not controverted by appellant, but, on the contrary, it is, in effect, admitted that the only method by which anything can be saved out of this trust property for the beneficiaries is by so modifying the trust deed as to permit a subdivision and sale of a portion of the property in order to meet the constantly increasing burdens that will be laid upon the premises. It further appears from the evidence, which is also undisputed, that if this trust property is platted and sold out as lots it will be worth \$480,000. It further appears that by platting one-half of the 160 acres it can be sold so as to realize to the estate \$250,000.

There are only two questions to be determined upon this record: First, has a court of equity jurisdiction to enter a decree modifying the terms of the trust deed; and second, if such jurisdiction exists are the facts presented by this record such as to justify the exercise of that power.

In regard to the jurisdiction of courts of chancery to direct the conversion of real estate into personal property, and *vice versa*, and to decree other modifications of trust agreements when it becomes necessary to preserve the trust estate, it may be stated as a general proposition that while the power is exercised with great caution it has become a well established rule that when the courts can see that unforeseen conditions have arisen which make it necessary, to preserve the rights of beneficiaries under trust instruments,

to change the terms of the trust, courts of equity have not hesitated to direct such necessary modifications as will preserve the trust estate for the use of the beneficiaries. The power of a court of chancery to thus modify the terms of trust instruments is sustained in this State by the following authorities: *Curtiss v. Brown*, 29 Ill. 201; *Voris v. Sloan*, 68 id. 588; *Longwith v. Riggs*, 123 id. 258; *Hale v. Hale*, 146 id. 227; *Gavin v. Curtin*, 171 id. 640; *Baldrige v. Coffey*, 184 id. 73; *Marsh v. Reed*, 184 id. 263; *Denegre v. Walker*, 214 id. 113; *Johnson v. Buck*, 220 id. 226; *Roberts v. Roberts*, 259 id. 115; *Packard v. Illinois Trust and Savings Bank*, 261 id. 450.

Some of the reasons which may properly impel the exercise of this jurisdiction were forcibly stated by Mr. Chief Justice Caton in *Curtiss v. Brown*, *supra*, where he said, on page 229: "The case might exist where the property was unproductive, as in this case, but where the *cestui que trust* was absolutely perishing from want or forced to the poor-house, or where the trustee could not possibly raise the means to pay the taxes upon the property and thus save it from a public sale and a total loss. Can it be said that the beneficiary of an estate which would bring in the market \$100,000 should perish in the street from want or be sent to the poor-house for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required, and in such cases the court must, as far as may be, occupy the place of the party creating the trust and do with the fund what he would have dictated had he anticipated the emergency." The doctrine of this case was quoted with approval by this court in the late case of *Roberts v. Roberts*, *supra*.

The only remaining question to be considered is whether the situation presented by this record is such as to warrant the exercise of the well established jurisdiction of the court of chancery to modify the terms of a trust agreement where conditions are such as to make it necessary. We have already referred to the general situation surrounding this property and the increased burdens that the estate will be required to meet, resulting from the improvements that are under contemplation by the city of Decatur. The facts here present the alternative of modifying the trust agreement or else losing the entire trust estate. Had the donor of this trust foreseen the exigencies that have arisen since the trust deed was made, a due regard for the interest of his beneficiaries would have compelled him to make a provision for the sale of a portion of this estate in order to preserve the whole. Apparently the only means left open to the beneficiaries under this trust is to appeal to a court of equity to preserve their estate by permitting a subdivision and sale of the premises, or, in other words, to authorize a conversion of real estate into personal property. In our opinion the facts present a case calling for the interposition of a court of equity in order to preserve a trust estate which would otherwise ultimately be lost to its owners.

Appellant suggests that the decree appealed from goes farther in directing the subdivision and sale of this property than is necessary. The decree authorizes the borrowing of money and the pledging of the trust estate, or some portion thereof, in case it becomes necessary to obtain funds to meet the demands against the estate. Whether or not the modifications as made are the most advantageous is a matter about which business men might reasonably differ. The best manner in which to manage this trust property is not a legal but a business proposition. We are not prepared to say that the decree rendered is not a judicious one in view of the situation that appears in this record. We would not feel justified in substituting our judgment



for that of the trial court upon a business proposition unless we were clearly convinced that a mistake had been made. Under all of the circumstances appearing in this record we are not disposed to find any fault with the decree that has been rendered.

The decree of the circuit court of Macon county will be affirmed.

*Decree affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. GEORGE W. SOLOMON, Plaintiff in Error.

*Opinion filed October 16, 1914.*

1. CONSTITUTIONAL LAW—*what is meant by the "subject" of an act.* The "subject" of an act, as that word is used in the constitution, means the matter or thing forming the groundwork of the act, and it may contain many parts which grow out of it and are germane to it, and which, if traced back, will lead the mind to the subject as the generic head.

2. SAME—the Wash-room act of 1913 embraces but one subject. The Wash-room act of 1913 embraces but the one subject of providing wash-rooms, and the act is not invalid because the providing of the wash-rooms may have the double effect of protecting the health of employees and securing the public comfort.

3. SAME—*when act is not invalid though title embraces more than one subject.* If an act embraces but one subject which is expressed in its title the act is not invalid, even though the title expresses more than one subject.

4. SAME—*when act must be assumed to have been intended to cover defects in former law.* Where an act has been held unconstitutional by the Supreme Court and the legislature subsequently passes a new act on the same subject, it must be assumed that the legislature had before it the decision of the Supreme Court and intended by the new act to remedy the defects pointed out in the former law.

5. SAME—*Wash-room act of 1913 is not invalid as class legislation.* The Wash-room act of 1913, properly construed, applies to all employments in which conditions exist that make such a law necessary and not merely to the employments enumerated and employments identical thereto, and is not invalid as class or special legislation.

6. SAME—*Wash-room act of 1913 not invalid because it interferes with property rights.* The Wash-room act of 1913 is a valid exercise by the legislature of the police power of the State, and is therefore not invalid because it interferes to some extent with property rights.

7. MINES—*Wash-room act of 1913 is not ambiguous or uncertain.* The Wash-room act of 1913 is not ambiguous or uncertain, as it applies to the employments specifically mentioned in the act and to all other like business of a permanent character where the same conditions prevail and where there are the same reasons why the law should apply.

WRIT OF ERROR to the County Court of Sangamon county; the Hon. J. B. WEAVER, Judge, presiding.

RICHARD S. FOLSOM, for plaintiff in error.

P. J. LUCEY, Attorney General, EDMUND BURKE, State's Attorney, and GEORGE P. RAMSEY, (ADOLPH BERNARD, and GILLESPIE & FITZGERALD, of counsel,) for the People.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The State's attorney of Sangamon county filed in the county court of that county an information charging plaintiff in error, Solomon, with the violation of an act passed by the Forty-ninth General Assembly, approved June 26, 1913, entitled "An act to provide for wash-rooms in certain employments to protect the health of employees and secure public comfort." The first two sections of the act are as follows:

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That every owner or operator of a coal mine, steel mill, foundry, machine shop, or other like business in which employees become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing, will endanger their

health or make their condition offensive to the public, shall provide and maintain a suitable and sanitary wash-room at a convenient place in or adjacent to such mine, mill, foundry, shop or other place of employment for the use of such employees.

"Sec. 2. Such wash-room shall be so arranged that employees may change their clothing therein, and shall be sufficient for the number of employees engaged regularly in such employment; shall be provided with lockers in which employees may keep their clothing; shall be provided with hot and cold water and with sufficient and suitable places and means for using the same; and during cold weather, shall be sufficiently heated."

Section 3 provides that it is the duty of the State and county mine inspectors, factory inspectors, and other inspectors required, to inspect places and kinds of business required by this act to be provided with wash-rooms, to inspect same and report to the owner thereof, in writing, the sanitary and physical conditions of the same, and make recommendations for such improvements or changes that may appear to be necessary for compliance with the provisions of this act. Sections 4 and 5 provide for penalties for violations of the act. (Laws of 1913, p. 359; Hurd's Stat. 1913, chap. 48, par. 184, *et seq.* p. 1226.)

A motion was made in the trial court to quash the information on the following grounds: "(1) That the statute with a violation of which the defendant is charged in the information is unconstitutional and void, as being in violation of article 2 of the constitution of the State of Illinois; (2) that the statute with a violation of which the defendant is charged in the information is unconstitutional and void, as being in violation of the fifth amendment to the constitution of the United States; (3) that the statute is void as being unreasonable and uncertain; (4) that the statute is uncertain and ambiguous; (5) that the statute is unconstitutional, invalid and void." The motion was de-

nied, a trial was had and plaintiff in error was convicted, and has sued out this writ of error to reverse the judgment of the county court.

The reasons urged against the constitutionality of the act in question, as argued in the briefs, are, that the act places a burden on employers of labor in certain employments and not upon corporations and persons employing labor in similar employments, and is therefore special and class legislation and in violation of the constitution of the United States and the constitution of the State of Illinois; that the act is void as being unreasonable, uncertain and ambiguous. It is also contended in the argument of plaintiff in error that the act violates the constitutional prohibition of section 13 of article 4 of the constitution of 1870, which provides that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."

As to the last contention, the "subject" of an act, as that word is used in the constitution, means the matter or thing forming the groundwork of the act, and it may contain many parts which grow out of it and are germane to it, and which, if traced back, will lead the mind to the subject as the generic head. (*People v. Sargent*, 254 Ill. 514.) If the act could be construed as an act intended to directly accomplish, by different means, the three-fold purpose of providing wash-rooms, protecting the health of employees and securing public comfort, there might be ground for this contention. The title, as worded and punctuated, expresses the subject of the act as providing for wash-rooms for the purpose of protecting the health of employees and securing public comfort. The body of the act merely requires that wash-rooms be provided and maintained and embraces but one subject. The subject of the act, as we read it, is the single one of providing wash-rooms, and that is sufficiently expressed in the title. Section 13 of article 4 of the constitution further provides, "but if any subject

shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed," so that, in any event, as the act only provides for wash-rooms and that subject being in the title, the act would not be invalid if more than one subject were embraced in the title. *People v. McBride*, 234 Ill. 146.

As to the other contentions, in the case of *Starne v. People*, 222 Ill. 189, this court held that a similar act passed in 1903, which, however, only applied to the owners or operators of coal mines, was unconstitutional on the ground that it was special or class legislation; that the legislature cannot require the owners or operators of coal mines, only, to provide and maintain wash-rooms for their employees, for the reason that such a law would place upon mine owners or operators a burden not borne by other employers of labor, and such enactment would be special legislation, and therefore unconstitutional and invalid. Any act of this kind, to be valid, must apply to all employers of labor similarly situated or to all employers of labor where conditions obtain which would require wash-rooms. The question remains, has this object been accomplished by naming, specifically, certain employments to which the act applies in the first section of the act, followed by the words, "or other like business in which employees become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing, will endanger their health or make their condition offensive to the public?"

In considering the points raised by counsel for plaintiff in error every presumption must be indulged in favor of the constitutionality of the law as enacted, and we are obliged to construe the act as in favor of its constitutionality and validity, unless we are satisfied, beyond a reasonable doubt, that the same is invalid. (*People v. McCul-*

*lough*, 254 Ill. 9; *People v. McBride*, *supra*.) We are further bound to construe this act in accordance with the intent of the legislature as expressed therein, and in so doing must take into consideration the previous legislation on this subject and the construction of such legislation by this court. We must assume that the legislature, in enacting the law of 1913 under consideration, had before it the decision in the *Starne case*, and that the intention of the legislature was to overcome the defects in the former law pointed out by this court and that it would not enact another law which would be open to the same objections. *Johnson Co. v. Beloosky*, 263 Ill. 363.

Counsel for plaintiff in error insists that under the rule of *ejusdem generis* the naming of certain employments in the act restricts the operation of the act to those employments specifically named and employments identical thereto; that the act does not apply to many other lines of employment the conditions of which are such that wash-rooms are just as necessary as in those named, and that unless the law can be construed as applying to all employments where wash-rooms are as necessary as in those mentioned, the law is still class legislation and open to the objections found in the *Starne case*. The rule of construction of *ejusdem generis* can not prevail, however, against the clear intent and meaning of the legislature, and we are of the opinion that the legislature intended by the act in question to remedy the defects found in the former law. By a fair construction of the law it applies not only to the employments named, but to all other like business of an established or permanent character in which the "employees become covered with grease, smoke, dust, grime and perspiration to such extent that to remain in such condition after leaving their work without washing and cleansing their bodies and changing their clothing, will endanger their health or make their condition offensive to the public." Under such construction the law will apply to all employments in which the

conditions exist that make such a law necessary and it would not be special or class legislation.

As to the remaining objections to the law, it cannot be denied that the law to some extent interferes with the private property rights of plaintiff in error and imposes conditions on the use of his property, but the same could be said of many other police regulations that have been enacted by the legislature and have been held constitutional and valid by the courts. The purpose of the law is to promote the health and welfare of employees in certain lines of business where the conditions are such that every facility should be afforded for cleanliness, and to provide for the comfort and welfare of those with whom such employees come in contact after leaving their places of employment. The right of the General Assembly to enact such laws is under the police power of the State as defined in *Town of Lake View v. Rose Hill Cemetery Ass'n*, 70 Ill. 191. Laws regulating the sale of intoxicating liquors, which are property; laws restraining and regulating the use of certain drugs and dangerous explosives, which are property, and laws prescribing the location and regulation of certain kinds of business which are lawful in themselves, have been held valid and constitutional under the police power which the State possesses, and which the legislature may exercise by enacting such laws as may be found necessary and appropriate to promote the health, comfort, safety and welfare of society. (8 Cyc. 864; *Booth v. People*, 186 Ill. 43; *Wall v. Allen*, 244 id. 456.) Nor, as we construe this law, is it ambiguous and uncertain. It applies to the employments specifically mentioned in the act and to all other like business of permanent character where the same conditions prevail and where there would be the same reasons for the law to apply.

For the above reasons we are constrained to hold the law valid and constitutional, and accordingly the judgment of the county court of Sangamon county will be affirmed.

*Judgment affirmed.*

THE ILLINOIS CENTRAL RAILROAD COMPANY, Appellant,  
vs. NANCY A. STEWART *et al.* Appellees.

*Opinion filed October 16, 1914.*

1. EASEMENTS—*what necessary to establish easement of private roadway.* To establish an easement of a private roadway over railroad tracks requires proof of the existence of the same elements that must be proved to establish a highway by prescription, and the use must have been adverse, uninterrupted, continuous and under a claim of right.

2. EMINENT DOMAIN—*when defendant is not entitled to damages for destruction of private roadway.* In condemnation the defendant is not entitled to damages for the destruction of a private roadway to his property over the petitioner's tracks even though the same has been in use for forty years, where there is nothing in the record to show that such use has not been entirely permissive, as an adverse right cannot grow out of a permissive use.

3. SAME—*when proof of what was paid for tract of land is not admissible.* In a proceeding to condemn a strip-off of a tract of land for right of way purposes it is not competent for the petitioner to prove what the defendant's ancestor paid for the entire tract some sixteen years before the condemnation proceeding.

APPEAL from the County Court of Pulaski county; the Hon. W. A. WALL, Judge, presiding.

W. W. BARR, C. E. FEIRICH, and L. M. BRADLEY, (BLEWETT LEE, and W. S. HORTON, of counsel,) for appellant.

C. S. MILLER, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellant, the Illinois Central Railroad Company, filed a petition in the county court of Pulaski county to condemn a small tract of land, 50 feet wide by 186 feet long, adjoining its right of way on the west side, in the village of Villa Ridge, in Pulaski county. The land sought to be condemned was twenty-one one-hundredths of an acre off the east side of a tract of land consisting of about one and



three-fourths acres belonging to appellees and occupied for residence purposes. The purpose of condemning this small strip of land adjoining the west side of appellant's right of way was to enable appellant to straighten a curve by moving its track about 64 feet west of its present location, and also to lower the track 14 feet below its present grade. Appellees, by cross-petition, claimed damages to land not taken. After hearing the evidence and viewing the premises the jury returned a verdict fixing the value of the land taken at \$600 and damages to the land not taken at \$400. From the judgment rendered by the court upon this verdict the petitioner has brought the record to this court for review, by appeal.

As we understand from the evidence, the property of appellees is higher than the present surface of appellant's tracks. In other words, it is a hill sloping towards the railroad. To sink the tracks 14 feet lower than they now are, at the place it is proposed to change them to, 64 feet west of their present location, would require an excavation 35 feet deep at its deepest place in front of appellees' property, the west line of the excavation proposed being within 22 feet of the west line of the land sought to be condemned. There is no public street or highway leading to appellees' property. Ingress to and egress from it has been by cartway over appellant's right of way from the premises to a public highway to the south and for foot passengers by a path across appellant's tracks. The land taken and the improvement proposed by appellant would destroy both the cartway and pathway, and appellees claimed damages on that account and offered proof to sustain such claim. The court instructed the jury that the destruction of the pathway was not an element of damages proper to be considered, but, over appellant's objections, permitted proof of damages on account of the destruction of the cartway. At the conclusion of the evidence the court instructed the jury as follows:

"That if you believe, from the evidence, that the defendants in this case have obtained a right to use a cartway over the petitioner's right of way and that the said cartway has occupied the same definite line or way over petitioner's right of way for the space of twenty years or more, and that the said cartway has been used by the defendants and their grantors for twenty years by consent of the petitioner, then this is a right that is of value to these defendants in getting to and from their premises; and if you believe, from the evidence, that the proposed improvement will destroy this right of way and that said destruction will depreciate the market value of the property, then you have a right to take that into consideration in arriving at your verdict."

The admission of proof of damages on account of the destruction of the cartway, the giving of said instruction, and the refusal to admit certain proof on the value of the property, hereafter referred to, are the principal grounds relied upon for a reversal of the judgment.

The only testimony as to the character of the cartway was, that it had existed and been used as a means of ingress to and egress from appellees' property for more than forty years. It is not claimed that it was a public highway or that the public had any interest in it, but it is claimed the owners of the property acquired a right to it as a private way to and from the property by using it for that purpose more than twenty years. To establish an easement in the land of another for a right of way to and from adjoining property requires proof of the existence of the same elements that must be proved to establish a public highway by prescription over private property. The use must be adverse, uninterrupted, exclusive, continuous and under a claim of right. (*Schmidt v. Brown*, 226 Ill. 590.) Where the use is merely permissive by the owner it is not adverse and forms no basis upon which a right of way by prescription can rest. The use of vacant, unenclosed and

unoccupied land will be presumed to be by permission and not adverse. (*O'Connell v. Chicago Terminal Railroad Co.* 184 Ill. 308, and cases there cited.) An adverse right to an easement cannot grow out of a mere permissive enjoyment for any length of time. (*City of Quincy v. Jones*, 76 Ill. 231.) There is no proof in the record that appellant's right of way over which the cartway ran was ever enclosed, or that appellees or their predecessors in title ever asserted or claimed any adverse right against appellant. For all the proof shows, the use of this cartway by appellees and their predecessors in title was permissive, merely, and in the absence of any proof of an adverse claim the presumption is that the use was by appellant's permission. No prescriptive right, according to all the authorities, can grow out of such use, no matter how long it continues. A number of appellees' witnesses testified that the principal damages sustained by appellees would result from the destruction of the passageway to and from the premises over appellant's right of way. It is apparent the damages must have been materially less if the destruction of said cartway had not been permitted to be proved and considered by the jury as an element of said damages. Under the proof the court erred in permitting this question to be considered.

Appellant offered to prove that Robert C. Stewart, appellees' ancestor from whom they derived title, bought the entire tract of land here in controversy, together with two additional lots, about sixteen years ago, for \$500 and sold part of it for \$200, making the cost of the one and three-fourths acres \$300. There was evidence tending to show that the village had not increased in population in twenty years and that the property had not increased in value, and there was no evidence of the sale of any property in the immediate vicinity of appellees' premises. The court sustained appellees' objections to proof of what the property was bought for sixteen years ago, and appellant insists this evidence, in view of the other testimony referred to, should

have been admitted. The material question to be determined was the present value of the property taken and the damage to the present value of the property not taken. In some cases it has been held competent to prove what the property sold for prior to the condemnation, but we do not think the proof was competent in this case. The sale was at a period too remote to be of any aid in determining the present value. *Lanquist v. City of Chicago*, 200 Ill. 69.

For the errors indicated the judgment will be reversed and the cause remanded, the costs of this appeal to be taxed to appellant.

*Reversed and remanded.*

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THE PEOPLE *ex rel.* A. E. Woods, County Collector, Appellant, *vs.* JAMES A. GREEN, Appellee.

*Opinion filed October 16, 1914.*

1. TAXES—*returns of hard roads tax election must be canvassed by supervisor, assessor and collector.* While there is no provision in the Township Organization act or the Hard Roads act requiring the canvassing board designated in section 7 of article 7 of the Township Organization act to canvass the returns of an election on the proposition to levy a hard roads tax and to issue bonds for hard roads, yet it must be held that the legislature intended the returns to be canvassed by such board.

2. SAME—*failure of a proper canvassing board to canvass returns is not fatal to the tax.* If there is no question but that the vote of the people at a hard roads tax election was in favor of the proposition, the tax should not be defeated, on application for judgment and order of sale, because the returns were canvassed by the town clerk and a justice of the peace instead of by the proper canvassing board.

3. SAME—*what not a valid objection to bond tax.* It is not a valid objection to a hard roads bond tax that the highway commissioners did not hold a meeting to determine what action they should take in respect to presenting a petition to the supervisor of the town and did not make any record in relation thereto. (*People v. Gough*, 260 Ill. 542, followed.)

VICKERS, J., dissenting.

APPEAL from the County Court of Edgar county; the Hon. DAN V. DAYTON, Judge, presiding.

W. H. HICKMAN, State's Attorney, SHEPHERD & TROGDEN, and JAMES W. & EDWARD C. CRAIG, for appellant.

H. S. TANNER, F. C. VANSSELLAR, W. S. LAMON, W. V. ARBUCKLE, and FRED RHOADS, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The collector of Edgar county applied to the county court of that county, at the June term, 1913, for judgment against the lands of James A. Green, appellee, for taxes alleged to be delinquent. Green filed objections, which were sustained. The People have prosecuted an appeal to this court from the order of the county court refusing judgment.

The taxes involved were levied for purpose of constructing hard roads in the town of Embarrass and for the payment of principal and interest on bonds issued to raise funds to build hard roads. The objections raised the question of authority in the commissioners of highways to levy these taxes, on the ground that the returns of the election at which was submitted the question of levying a tax for hard roads had never been canvassed by the officers designated by the statute for that purpose. The town of Embarrass has two voting precincts, and an election was held in each of these precincts to vote on a tax for hard road purposes. After the election was held returns were filed with the town clerk, and said returns were canvassed by him and one of the justices of the peace of said town. The proposition was by these officers declared carried.

Section 3 of the Hard Roads law provides (Hurd's Stat. 1911, p. 2036,) that "if a majority of all the ballots cast at said election shall be in favor of said special tax, then it shall be the duty of the commissioners of highways of the township \* \* \* to levy a tax in accordance

with said vote." Section 4a of that act, as amended in 1909, (Hurd's Stat. 1911, p. 2036,) provides that the returns of the election shall be "made in the same manner as other special town (or district) elections are now or may hereafter be provided by law." This last is the only portion of the act which might be construed as referring in any way to the canvass of the returns, and only provides how the returns shall be made and not how they shall be canvassed. Section 7 of article 7 of the Township act provides (Hurd's Stat. 1913, p. 2444,) that in organized townships "the supervisor, together with the assessor and collector, shall, within five days thereafter, meet and canvass said returns and declare the result of said election." While this section does not refer specifically to canvassing the returns as to propositions, in our judgment the legislature intended that the elections held under the Hard Roads statute in counties under township organization should on any question be canvassed by the same board as under the law is required to canvass other township elections,—that is, the supervisor, assessor and collector. The town clerk and justice of the peace were therefore without authority to act as a canvassing board or to declare the result of this election.

Can this tax, as levied by the highway commissioners, be questioned in this proceeding because the canvass was not made by the proper officials? In considering the question as to ascertaining the result in elections on questions submitted for adoption or rejection by the electorate, the usual rule seems to be that the votes are counted and the returns made in the same manner as in other elections unless there is some provision to the contrary. The canvassing of the votes by the wrong officers, however, is but a mere irregularity. (5 McQuillin on Mun. Corp. sec. 2200.) In a township election in this State where railroad bonds had been voted and the ordinary judges of election had canvassed the votes instead of the moderator of the town

meeting, it was held by the United States circuit court in *Marcy v. Ohio*, 17 Fed. Cas. 64, that this was not vital; that "the main thing in this election was to determine whether there was a majority of the voters in favor of the subscription upon the conditions named. There is no dispute but that there was such a majority, and the fact that certain persons named as judges by common consent received the votes and canvassed them is nothing more than an irregularity," etc. This decision was affirmed in 85 U. S. 552. The canvass of the returns or the certificate of election is merely *prima facie* evidence as to the result. In a proper proceeding the authorities may go behind the certificate or the canvass and ascertain the real facts. The duties of the canvassing board are merely ministerial, and omissions or mistakes of that board can have no controlling influence on the election. (15 Cyc. 382, 387, and cases cited.) "The failure or refusal of the proper officer to issue a certificate of election to a person duly elected to an office cannot operate to deprive such person of his rights. The certificate or commission is the best but not the only evidence of an election, and if that be refused secondary evidence is admissible." (McCrary on Elections,—4th ed.—sec. 205.) It is not in the power of election officials, by neglecting or refusing to give the proper certificate, to defeat the will of the people, for the ballots determine the election and not the certificate, and the person chosen from whom the certificate is withheld may nevertheless proceed to qualify and take possession of the office unless opposed by a *de facto* incumbent. The right to the office depends on the ballots and not on a commission. (Cooley's Const. Lim.—7th ed.—934, 940; *State v. Draper*, 50 Mo. 353.) The legality of the election and the rights, powers and duties of the office do not depend upon the fact of the declaration of the board of elections. "That declaration is proper and is the usual practice, but withholding it or neglecting causelessly or illegally

to make it will not prevent the installation in and investment with the office. The authority, rights and powers of such officers are derived from the election and not from the returns, which are the usual prescribed evidences of it." (*People v. Kilduff*, 15 Ill. 492.) In reaching the correct results in proper proceedings in election matters very little attention is paid to mere irregularities in the acts of election officers which do not affect the real merits of the case. If the statute expressly declares any particular act to be essential to the validity of the election or that its omission shall render the election void the courts must enforce the provisions of such statute, but in cases where the statute simply declares that certain things shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they affect the actual merits of the case, but they will be considered directory, only, and not vital to the election, unless they are such, in themselves, as to change or render doubtful the result. (McCrary on Elections,—4th ed.—secs. 221, 225, 227.) The provisions of statutes which control the "recording and return of the legal votes received and the mode and manner of conducting the mere details of the election are directory." (McCrary on Elections,—4th ed.—sec. 228.) In discussing the question of the sufficiency of the returns in an election matter this court has said: "The question in all such cases should be, whom did a majority of the qualified voters elect? Forms should be made subservient to this inquiry and should not rule in opposition to substance. A literal compliance with prescribed forms is not required in any case if the spirit of the law is not violated, and in all cases the intentions of the voters, clearly ascertained, should govern." (*People v. Hilliard*, 29 Ill. 413.) This court has frequently held that the provisions of the election statutes as to the manner of conducting the details of an election are not



mandatory but directory, and that mere irregularities in the manner of proceeding, and which deprive no legal voter of his vote and do not change the result, will not vitiate an election. (*Ackerman v. Haenck*, 147 Ill. 514; *Behrensmeyer v. Kreitz*, 135 id. 591; *Hodge v. Linn*, 100 id. 397.) "While the legal safeguards which are thrown around the ballot must be faithfully observed by those who have been entrusted with their enforcement, yet, under the pretense of enforcing them, the will of the people as expressed at the polls is not to be defeated by mere technicalities." (*People v. Nordheim*, 99 Ill. 553; *People v. Ruyle*, 91 id. 525.) Ordinary citizens cannot be expected to observe every possible formality and the strict letter of the statutes concerning non-essentials. The success or failure of popular government in the end rests on the great mass of the citizens,—“the plain people.” The canvassing and returns of votes are made in the hurry and excitement of election. The will of the people should not be defeated by useless forms or idle technicalities. When the result of the election has been fairly ascertained it should be given full effect. McCrary on Elections, (4th ed.) sec. 243; *People v. Chicago and Eastern Illinois Railroad Co.* 214 Ill. 190.

In this case the returns of the judges and clerks were produced in the trial court and are in the record. From this record there can be no question that “a majority of all the ballots cast at said election” were in favor of such tax. This seems to be conceded. The failure of the proper election officials to canvass the returns should not be permitted, in a proceeding of this kind, to defeat the will of the people as manifested at the election. This court has held that “any error or informality in the acts of the officers or proceedings for the levy of a legal tax, not affecting its substantial justice, is to be disregarded or amended,” etc. *People v. Worley*, 260 Ill. 536.

It is argued, however, by counsel for appellee, that in the case just cited it was held that the election was illegal

because the ballot was not in proper form, and that the conclusion in that case sustains their position here. In this they are in error. In that case the defect in the ballot prevented the ascertaining of the will of the people, it being impossible to decide, from the form of the ballot, whether a person was voting for or against the borrowing of money. Section 191 of the Revenue act provides, among other things, "no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof." (Hurd's Stat. 1913, p. 2058.) The defect complained of here is a mere irregularity which does not tend to thwart in any way the will of the people nor affect the substantial justice of the tax.

The further objection of counsel for appellee that the tax in question is void because road No. 1 described in the petition passed through an incorporated town is identical with an objection raised in *People v. Worley*, *supra*, and ruled on adversely to appellee's contention. Appellee argues that the conclusion in that case was incorrect. We see no reason to modify or change that conclusion.

Some of the objections made to the hard road tax were also interposed as to the bond tax, and the bond tax was also objected to on the ground that the highway commissioners did not hold a meeting to determine what action, if any, they should take in respect to presenting a petition to the supervisor of said town and did not make any record in relation thereto. This is the same objection that was made to a bond tax in the case of *People v. Gough*, 260 Ill. 542. It was there held that the objection was without merit.

The objections of appellee should have been overruled by the county court. The order of that court will therefore be reversed and the cause remanded, with directions

to the county court to overrule the objections and enter an order for judgment of sale.

*Reversed and remanded, with directions.*

Mr. JUSTICE VICKERS, dissenting.

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THE CHICAGO TERMINAL TRANSFER RAILROAD COMPANY,  
Appellee, vs. DAVID BARRETT, Appellant.

*Opinion filed October 16, 1914.*

RES JUDICATA—a judgment in forcible detainer does not bar action of ejectment. A judgment in a forcible entry and detainer case adjudicates only the question of the right to immediate possession and is not a bar to an action of ejectment; nor can it be applied as an estoppel, except as to the question actually litigated and determined.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

COBURN & BENTLEY, for appellant.

JESSE B. BARTON, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

On the former appeal of this cause (252 Ill. 86,) it was held that the plaintiff need not go back of the decree mentioned in the opinion then rendered to prove its title as against the defendant on November 11, 1902. Upon the remandment of the cause a second trial was had, at which the decree referred to was admitted in evidence. Thereupon the defendant gave in evidence, over the plaintiff's objection, the docket and files of a justice of the peace showing a forcible entry and detainer suit by the plaintiff against the defendant for the premises here involved, begun in August, 1903, in which judgment was rendered for the

defendant in November, 1903. Judgment for the possession of the premises and for costs was rendered in favor of the plaintiff, and the defendant appealed and now argues that the judgment in the forcible entry and detainer suit adjudicated that the defendant was at the time in the rightful possession of the premises, that the burden was upon the plaintiff to show that the defendant remained in possession of the premises as the tenant of the plaintiff from the time the chancery suit was begun until the time this suit was begun, and that the judgment should have been for the defendant.

The judgment in the forcible entry and detainer suit was no bar to the maintenance of this action of ejectment, for the reason that the questions involved in the two suits are not the same. The object of the ejectment suit is to try the title to the property, while in forcible entry and detainer only the immediate right of possession is involved and the title cannot be inquired into. (*Riverside Co. v. Townshend*, 120 Ill. 9; *Roby v. Calumet and Chicago Dock Co.* 211 id. 173.) The forcible entry and detainer suit cannot be regarded as an adjudication of the title, and it could be applied as an estoppel only to the point or question actually litigated and determined. No evidence was introduced as to any question which was litigated in that case. It appears that the lease of December 1, 1884, was introduced in evidence, but there is nothing to indicate what the issue was which was submitted to the jury. The judgment decided that the plaintiff was not entitled to recover the possession on the date his complaint was filed, but so far as appears there was no adjudication or estoppel as to any point involved in this case. It was decided on the former appeal that the decree was sufficient to authorize a judgment for the plaintiff. No defense having been shown, the judgment for the plaintiff must be affirmed.

*Judgment affirmed.*

ROMAIN BLAKESLEE, Appellee, vs. LAURA E. BLAKESLEE,  
Appellant.

*Opinion filed October 16, 1914.*

1. PLEADING—*when defendant is not relieved from admission in answer withdrawn by leave of court.* The fact that the defendant's original answer in a partition suit is withdrawn by leave of court does not relieve the defendant from the effect of an admission therein that the complainant was entitled to partition, where the record does not show that the order granting such leave was based upon an affidavit that the admission was improvidently made.

2. PARTNERSHIP—*how question whether real estate is partnership property is determined.* Whether real estate is partnership property or not depends largely upon the intention of the partners, which may be shown by their acts and conduct or by proving an express agreement; and the mere fact of the use of the land by the firm does not make it partnership property, nor is it necessarily the individual property of the members of the firm because the title is held by them as individuals.

3. PARTITION—*fact that real estate is leased does not prevent partition.* The fact that the real estate sought to be partitioned is leased to a tenant for a period of ten years, with an option to purchase, does not deprive a co-tenant of his right to partition, in the absence of any other circumstances tending to show an estoppel upon his part to claim partition. (*Martin v. Martin*, 170 Ill. 639, distinguished.)

APPEAL from the Circuit Court of Cook county; the  
Hon. JESSE A. BALDWIN, Judge, presiding.

ERIC WINTERS, for appellant.

BRADY & RUTLEDGE, (JAMES A. BRADY, of counsel,)  
for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellee, Romain Blakeslee, filed his bill in the circuit court of Cook county for the partition of certain property therein particularly described and known as Nos. 435 and 437 South Western avenue, in the city of Chicago. The

bill alleged appellee was the owner of the undivided one-half of said property and that Laura E. Blakeslee, appellant, was the owner of the other undivided one-half. In addition to asking for partition, the bill alleged appellee had, with the knowledge and consent of appellant, caused extensive improvements on the property to be made, which he paid for out of his own means; also that he had paid various sums for repairs, taxes and assessments, and he prayed an accounting therefor. Appellant answered the bill, admitting she and appellee were owners of the property as tenants in common and substantially admitting all the material allegations of the bill. The answer did not deny that appellee had made improvements upon the property but called for strict proof of the amount. The answer denies appellee had expended anything for taxes, repairs and assessments on the property, and admits that a division or partition of the premises so owned in common by the parties should be made. The cause was referred to a master to take the proof and report his conclusions of law and fact. While the cause was pending before the master, and after the taking of testimony had begun, appellant obtained leave of the court to withdraw her answer and file an amended answer. The amended answer denied the property was owned by appellant and appellee as tenants in common, and averred said parties were partners and that the property was a partnership asset, that the partnership still existed, and the property was not subject to partition. As a further reason why appellee was not entitled to partition, the answer alleged that appellant and appellee, as co-partners, on the first day of August, 1910, leased the property to one Robert Shine and also gave him an option to purchase said premises. For these reasons the answer averred the property could not be sold, under a decree, for its full value and that it would be inequitable and unjust to decree its sale. The master found and reported, from the testimony, that the property was owned by the parties as ten-

ants in common, stated the account between the parties and recommended a decree as prayed in the bill. The chancellor overruled exceptions to the report and entered a decree in conformity therewith, from which decree defendant, Laura E. Blakeslee, has prosecuted this appeal.

A brief statement of certain leading facts is as follows: On February 5, 1901, appellant owned in fee simple the property sought to be partitioned, subject to a mortgage which had been foreclosed or was in the process of foreclosure. There was a two-story brick building on part of the property and a barn in the rear. Appellant had for several years prior to February 5, 1901, with her brother, been conducting a storage and livery business on the premises. She was then Laura E. Dupee. Some time prior to February 5, 1901, negotiations began between appellant and appellee for the purchase by appellee of an undivided one-half interest in the property. Just how long these negotiations were going on before the date mentioned does not appear from the evidence, but it does appear that before or on that date they had reached an agreement by which appellee was to purchase an undivided one-half interest for the sum of \$4000, and on said day appellant executed to appellee a warranty deed conveying him the undivided one-half of the property, subject to one-half of all taxes and assessments levied for the year 1900. The consideration expressed in the deed was \$4000. Articles of co-partnership were entered into between the parties, bearing the same date as the deed, wherein it was agreed appellee was to purchase a one-half interest in the property and that said parties formed themselves into a partnership, to be known as Blakeslee & Dupee, for the purpose of conducting a general warehouse and storage business on said premises. The agreement recited they were to be equal partners and share equally in the profits and losses of the business. Appellant agreed to devote her time and services to the management of the office and keeping the books and accounts

of the business, and appellee was to do the soliciting and outside work and have the general management and oversight of the business. Neither party was to receive any salary. The partnership was to continue until dissolved by mutual agreement or by operation of law. On the 23d of February, 1910, appellant and appellee were married to each other. Discord and disagreements arose between them, and on the first day of August, 1910, they leased the property in controversy, together with other property belonging to appellee, to Robert Shine for ten years. The lessee was to pay as rent \$35,000, in monthly installments of \$291.66 each. It was agreed between appellant and appellee that \$125 of this amount represented the monthly rental of the property in controversy. The lessee was given the privilege of a renewal of the lease at the end of the term for another ten years upon complying with certain conditions mentioned. He was also by the same instrument given the privilege of purchasing the property at any time within five years after the date of the lease, for \$30,000. Also, on said August 1, 1910, an agreement was entered into between said lessee, Shine, and appellant and appellee, for the sale to Shine of the business, property and good will of the partnership. The agreement recited the terms upon which the partnership assets were sold to Shine, and he was given the right to use the partnership name of appellant and appellee in the conduct of the business during the term of the lease.

There never was any express agreement between the parties, verbal or written, that the real estate sought to be partitioned was to be an asset of the partnership, but appellant contends that it was shown by acts and conduct that it was intended by the parties to be, and was, a part of the assets of the partnership. To sustain this position reliance is placed upon some acts and statements of the parties, but particular reliance is placed upon the partnership books. For some time after the partnership was entered into ap-



pellant kept its books of account. The books kept consisted of cash books and memorandum books. In 1908 a competent book-keeper and accountant was employed, and from the books kept by appellant or information furnished by the parties, or one of them, or from both said books and information, the said book-keeper prepared a journal and ledger. The books of original entry were not offered in evidence before the master but the journal and ledger prepared by the accountant were offered but not admitted. It appears from pages offered in evidence and copied in the abstract, that in the books as prepared by the accountant the real estate was treated as a partnership asset. Appellee appears to have had very little knowledge of the books, and it is not shown that it was by his authority or direction that the accountant made up the books treating the real estate as firm assets, nor is it shown that he at any time objected to or raised any question about the property being so treated. Without further going into detail, appellant's proof tended to show that the real estate was treated as an asset of the firm. On the other hand, the proof of appellee tended to show that it was not so considered and treated.

In the original answer filed by appellant she admitted she and appellee were tenants in common and that he was entitled to partition. Appellant contends that this answer is not entitled to be considered and ought not to prejudice her, because it was withdrawn by leave of the court. Appellant's position, in effect, is, that the answer should be treated as one wherein an admission has been improvidently made and the party making it has been relieved of its effect by order of the court. This would be true if the order were based upon an affidavit that the admission was made under a misapprehension or by mistake. (*Maier v. Bull*, 39 Ill. 531.) Appellant calls attention to the fact that it does not appear from the record that no such affidavit was filed. The record shows that on motion of the solicitor for

appellant it was ordered she have leave to withdraw her original answer, file an amended answer instanter, and that the master hear the evidence and report his conclusions upon the issues made by the bill and amended answer. No order was made relieving the appellant from the admission made in her answer, and we would be unwarranted in assuming that the order made was based upon an affidavit that the admissions in the answer were improvidently made. If that were the fact it should be shown by the record.

As there was no express agreement that the real estate should be partnership property, whether or not it was must be determined from the acts and conduct of the parties themselves. In *Robinson Bank v. Miller*, 153 Ill. 244, it was said the mere fact of the use of land by a firm does not make it partnership property, nor is it necessarily the individual property of the members of the partnership because the title is held by the several members of the firm as individuals. Whether real estate is partnership property or not depends largely upon the intention of the partners, which may be shown by proving an express agreement or by the acts and conduct of the partners. In the above cited case the purchase of real estate by three parties for the purpose of building and operating a flour mill thereon, and its subsequent improvement out of partnership assets and its use by the firm, did not make it partnership property. In *Bopp v. Fox*, 63 Ill. 540, a purchase of land by four parties with their individual funds, the title being taken by them in their individual names, was held to be a purchase for partnership purposes and the land constituted a partnership asset. *Robinson Bank v. Miller*, *supra*, is reported in 27 L. R. A. 449, where an exhaustive note upon this subject will be found. The general doctrine of the cases seems to be that the purchase of lands with partnership funds is necessary to make it firm property, but this rule will give way, in equity, where it clearly appears the land was intended by the parties to be firm property and was so con-

sidered and treated by them. In order, however, to come within the exceptions to the general rule the intention of the parties must be clear and explicit.

It appears from the proof appellee agreed to purchase a one-half interest in the property some time prior to the forming of the partnership. As part payment of the \$4000 consideration he was given credit for some \$1500 he had previously advanced appellant. The balance of the consideration was paid by appellee paying \$2500 on an existing encumbrance. Appellant's deed to appellee of a one-half interest recites it is subject to one-half the taxes and assessments levied for the year 1900. This would make appellee liable, individually, for the taxes and assessments. While the articles of partnership recite appellee is to purchase of appellant a one-half interest in the premises in question, it does not provide such premises shall constitute assets of the partnership or that appellant and appellee shall share in the rents and profits of such real estate, but provides that the net profits of the business conducted therein shall be divided equally. The encumbrances placed upon the property during the partnership were executed in the individual names of the partners and not in the partnership name, and in 1909, when appellee borrowed \$5000 on the property for his individual use, before appellant would join in a trust deed on such property she required and obtained a bond indemnifying her from any loss, damage or expense which might be caused her in joining in the trust deed. This indemnifying bond recited it was secured by a mortgage from appellee on his undivided one-half of the premises in question. At the time they executed the lease of the premises to Robert Shine, August 1, 1910, they signed it as individuals and not as co-partners. On the same day the lease was made the parties executed to Shine, in their individual names, a bill of sale of the business conducted by them on the premises. After the lease to Shine the rent appears to have been equally divided between appellant and

appellee until February, 1912. From February to August, 1912, appellee collected the rents, until appellant by written notice dated August 27, 1912, notified Shine that the appellee was no longer her agent to collect the rents and demanded that he pay to her one-half the rent on the premises, or \$62.50, monthly. After Shine was served with this notice it appears he paid the appellant her one-half of the monthly rental and received her individual receipts for the same. The last receipt given Shine by appellant was after the amended answer in this suit was filed. It appears the agreement to purchase preceded the forming of the partnership between appellant and appellee, though the deed and partnership articles were executed the same day. The property was bought with individual funds of appellee, and he paid a part of the purchase price by being credited with advances made a considerable length of time before the deed was executed.

The foregoing, together with other facts and circumstances not herein specifically referred to, tended to show the property was not treated and regarded by the parties as partnership property. Upon a consideration of all the evidence it cannot be said that the finding of the decree that the parties owned the property as tenants in common and not as partners was contrary to the evidence.

Appellant also contends that although the property be found to belong to appellant and appellee as tenants in common, appellee is estopped from having partition of the premises because of the lease to Shine and an alleged agreement between appellant and appellee that they would resume the partnership business at the expiration of the Shine lease, should he not elect to purchase the property. The fact, alone, that the premises are under lease to Shine is no reason why partition cannot be had. Any purchaser at the sale of the property would take the same subject to the rights of Shine under the lease, and the fact that the property might not bring as much as if it were not under lease

can have no bearing on the right to partition, in the absence of other circumstances. Partition by a co-tenant, when properly brought, is a matter of right, (*Hill v. Reno*, 112 Ill. 154; *Martin v. Martin*, 170 id. 639; *Hynes v. Jennings*, 262 id. 268;) and will be granted unless the party asking for partition is estopped by his own agreement or it would be in violation of a condition or restriction imposed upon the estate by one through whom he claims. *Dee v. Dee*, 212 Ill. 338; *Ingraham v. Mariner*, 194 id. 269.

*Martin v. Martin*, *supra*, is much relied upon by appellant. In that case, after stating the general rule that an adult tenant in common may demand partition as a matter of right, it is said the general and recognized exception to the rule is: "If several tenants in common or joint tenants should covenant between themselves that the estate should be held and enjoyed in common, only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties against the objections of the others." In that case the property was so situated that it could not be partitioned, and as land at that time had greatly depreciated in value, the owners made a verbal agreement that they would not seek a partition but would lease it until a purchaser could be found who would pay a satisfactory price. It was held the land could not be partitioned during the existence of a lease executed in pursuance of the agreement. The court said the lease executed in carrying out this agreement evidenced that the intention of the agreement was that there should be no partition until the lease expired. The proof here does not bring the case within the rule of *Martin v. Martin*, *supra*.

We find no error in the record requiring a reversal of the decree, and it is affirmed.

*Decree affirmed.*

SIMON STRAUS, Defendant in Error, vs. JOSEPH PUTTA  
et al. Plaintiffs in Error.

*Opinion filed October 16, 1914.*

1. EASEMENTS—*what reservation in deed reserves an easement.* Where the owners of a lot convey the west half thereof by a deed containing a provision that "in part consideration of this deed the purchasers, their heirs and assigns, agree to leave perpetually vacant the east 3 feet by 125 feet of said premises," an easement is thereby reserved in favor of the owners of the east half of the lot and passes under a ninety-nine year lease executed by them.

2. SAME—*circumstances in view of parties may be considered in construing provision for easement.* In construing a provision in a deed expressly granting an easement it is proper to consider the circumstances and considerations in view of the parties at the time the grant was made which moved them to its execution and acceptance.

3. SAME—*provision reserving an easement construed.* A provision in a deed to the west half of a lot that the purchasers shall "leave perpetually vacant the east 3 feet by 125 feet of said premises" is properly construed to mean that such strip shall remain unobstructed by fences or buildings, where the grantor subsequently leased the east half of the lot for ninety-nine years for the purpose of having a theater building erected thereon, which, under the ordinances of the city, was required to have emergency exits and which exits opened on such strip.

WRIT OF ERROR to the Superior Court of Cook county;  
the Hon. CHARLES A. McDONALD, Judge, presiding.

Q. J. CHOTT, (FRANK H. CULVER, of counsel,) for  
plaintiffs in error.

FRIEDMAN & ADER, (JOHN S. STEVENS, of counsel,) for  
defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The defendant in error, Simon Straus, complainant in the court below, filed his bill for an injunction against the plaintiffs in error, Joseph and Mary Putta, defendants in

the court below, charging that Edward and Albert Mendel were the owners of lots 1, 2, 3, 4, 5 and 6, in block 1, in Willard & Wetmore's subdivision, in the city of Chicago, and that on October 1, 1911, they made a lease to the complainant of lots 1, 2, 3, 4 and 5 and the east half of lot 6 for ninety-nine years at a certain rental, and subject, among other provisions, to a requirement on the part of complainant to erect certain buildings on the land so devised; that in accordance with said provisions complainant had erected and was just completing upon said premises, among other buildings, a theatre building which covers a portion of the land so devised and abuts on said west half of lot 6; that theretofore, on January 14, 1911, said Mendels conveyed, by warranty deed, the west half of lot 6, adjoining the east half of said lot 6, to said Joseph Putta and Mary Putta; that by said deed said Puttas agreed to leave perpetually vacant the east 3 feet by 125 feet of the west half of said lot 6, and that such agreement was a covenant running with the land; that said complainant has erected said theatre building in accordance with the ordinances of Chicago, and that he has built in the west wall thereof, and close to the east line of the west half of lot 6, two emergency exits, four by seven feet, which are closed by iron doors attached to and swinging close upon said building, to be used only in case of emergency, such as fire, in providing for persons then in said theatre means of exit through said doors; that said Puttas, in violation of said agreement, have constructed and maintained on the north line of said east three feet a permanent iron fence, on the south line thereof a stable and on ten feet of said east three feet a wagon shed; that one of the exits built in said wall comes within the space occupied by said shed, in which said defendants have placed a wagon, so that persons in an emergency cannot step out or go through said emergency exit on account of said obstruction; that said defendants have placed opposite the other emergency exit planks and

boards, so that the same is closed and barricaded and rendered useless in an emergency to persons in said theatre; that complainant has demanded that said defendants remove said obstructions; that the ordinances of Chicago require that before complainant can open said theatre he must have exits in the west wall of said building unobstructed, so that they may be used in an emergency; that the defendants did not object to the complainant erecting said theatre; that said defendants have placed obstructions upon said exits, so that, unless restrained by this court, they will interfere with the possession of the complainant in said property; that relying upon said agreement, and upon the fact that said defendants would comply with the same, the complainant erected said building; that defendants knew that complainant expected to have said east three feet remain vacant for the purpose of complying with the ordinances of Chicago, and made no objections; that complainant has expended \$50,000 in erecting said theatre, which he would have erected differently had not said conveyance contained said agreement. The prayer of the bill was that defendants be restrained from interfering with the possession of complainant in his property, and from placing any obstruction, building, fence, etc., in, upon or along said three-foot strip; that a mandatory injunction be issued requiring defendants to remove the iron fence, barn, wagon shed, wagon, planks and boards, etc., from said east three feet of said lot 6, and that they be enjoined from placing any obstruction thereon which will prevent unobstructed egress and ingress.

The defendants filed an answer, in which they admit that the complainant is in possession of the land described in said bill; admit that the Mendels conveyed to them the west half of lot 6, and that the deed conveying the same to them contained the words, "in part consideration of this deed the purchasers, their heirs and assigns, agree to leave perpetually vacant the east 3 feet by 125 feet of said premises," and allege that they have always left vacant said east



3 feet by 125 feet and that the same is now vacant; admit that complainant has made two openings or doors in the west wall of said theatre building, which doors, if opened, must swing over and upon the land of these defendants, and allege that complainant has no right to swing such doors over or upon their land and that he cannot do so without committing a trespass; admit that the sole and only purpose of the said doors or openings is to provide means whereby persons in said theatre can pass through said doors or openings to and upon the land of defendants, and call attention to the allegations of the bill that it is the intention of complainant to make use of the real estate of defendants as a means of exit for persons in said theatre, to all of which he has no right; admit they made no objections to the erection of said building but allege they had no right to do so; admit they are now maintaining on the north line or street line of their land an iron fence and allege they have a right to maintain it; deny that there is a barn on the south end of said east three feet; admit there is a temporary wagon shed on two of said three feet for about ten feet thereof, but allege said wagon shed was there when they acquired title and possession, and deny said temporary shed interferes with any legitimate use by complainant of his land; allege that there was a fence upon the lot line dividing the real estate of defendants from that acquired by complainant at the time he acquired the same, and that they are now maintaining the same and have a lawful right so to do; allege that said complainant has no lawful right to complain that a wagon is sometimes on said east three feet, and allege they have a right to put and keep said wagon there; admit that the fence which was on the lot line between the land of complainant and defendants when complainant acquired his land may be in front of said exits which complainant has without right placed in the west wall of his theatre, and allege they had, and have, a right to erect and maintain the same and that such fence

is not a violation of said provision in the deed conveying said land to them, and deny that said complainant has any right to complain thereof; admit that they have refused to remove said fence and other structures from said east three feet, and allege they are under no obligation so to remove them or any of them; allege that they had, and have, a lawful right to erect and maintain them and that they are not a violation of the provision of said deed; allege that complainant has no right, by reason of said provision of said deed or otherwise, to require them to furnish the use of their real estate for an emergency exit or for any other purpose; allege that complainant has not filed his bill in good faith and with the intention of enforcing the provision of said deed, but that he has filed the same with the intent of acquiring, if he can, the right to use the land of defendants to provide a passageway for persons attending his theatre, from said theatre over and along the property of defendants to the street; allege that the only right given by said provision in said deed to complainant, if it gave him any right, (which is denied,) was and is an easement of air and light.

The case was heard on the bill and answer, and when a case is so submitted the answer is to be taken as true. (*Roach v. Glos*, 181 Ill. 440.) Upon a hearing the court entered a decree ordering the defendants to remove all fences and obstructions upon and enclosing said three-foot strip, and further to remove all sheds, structures and obstructions of any kind, and perpetually enjoining them from erecting any other building or structure upon said three-foot strip, and decreeing that they should suffer said three-foot strip at all times to remain vacant and unoccupied. The defendants objected to the entry of the decree and have sued out a writ of error from this court, a freehold being involved, and have assigned as errors the entering of the decree in favor of the complainant and against the defendants; in not entering a decree dismissing the bill for want

of equity; in not holding that the bill of complaint did not state a cause of action; in not holding that the answer in said cause should be taken as true and a complete defense to the bill; and in entering a decree mandatory in its character, commanding the defendants to do affirmative acts.

We have set out the bill and answer at some length to show the contentions of the respective parties as to their rights and interests in the premises. As appears from the allegations of the bill, the deed from the Mendels to the Puttas contained the following reservation: "In part consideration of this deed the purchasers, their heirs and assigns, agree to leave perpetually vacant the east 3 feet by 125 feet of said premises." Subsequently the Mendels gave to defendant in error a ninety-nine year lease to the east half of lot 6, adjoining the strip in question. This was admitted by the answer, and while the answer alleges that said three-foot strip is vacant, it is also admitted in the answer that the shed, lumber and fences have been placed thereon as charged in the bill. Plaintiffs in error, Joseph and Mary Putta, claim that they have a right to place and maintain these obstructions on said three-foot strip and that the same are not in violation of the reservation in their deed for the lot, and deny that defendant in error has any right to any use of said three-foot strip. The effect of the reservation in the deed of plaintiffs in error was to create an easement in favor of the owners of the east half of lot 6 adjoining the three-foot strip in question, and this right passed to defendant in error by the ninety-nine year lease.

The principal question is the extent of the right reserved by the provision in the deed. While this right must be ascertained from the words of the instrument creating it, we have held that in construing an easement which is given by express grant it is proper to consider the circumstances and considerations in view of the parties at the time the grant was made, which moved them to its execution and

acceptance. (*Louisville and Nashville Railroad Co. v. Koelle*, 104 Ill. 455.) As said in *Ashelford v. Willis*, 194 Ill. 492, in which an easement of right of way was involved (p. 503): "It is always admissible, in determining the effect of an instrument or considering its meaning, to look to all the facts and circumstances surrounding the making of it." In the case at bar the Mendels sold the west half of lot 6, and the deed contained a reservation that the east three feet of said west half should remain vacant. They had some purpose in making such reservation. Such intent and purpose are perhaps best shown by the subsequent action of the Mendels in granting the ninety-nine year lease to Straus, with the provision, as alleged in the bill of complaint, that he should erect a theatre building thereon. They were presumed to know the law and the ordinances of the city of Chicago bearing on the construction of such buildings, and that under those ordinances theatre buildings must be provided with emergency exits, as a wise and reasonable precaution in case of fire or the happening of some event which would make it necessary for large crowds to leave such buildings quickly. On the other hand, had the Mendels, by the terms of the ninety-nine year lease, required the erection of a building which would not require openings for emergency exits but which would require a greater amount than common of light and air, there would be good reason for holding that the words in the deed requiring the strip in question to remain vacant should be construed as an easement of light and air, only. It would seem, under the circumstances, that it was the intention of the parties by the use of the word "vacant," as applied to the strip in question, that said strip should have nothing on it,—should be unobstructed,—for the benefit of both abutting proprietors. The bill sets out the reservation in the deed and the obstructions on the three-foot strip. The answer admits both. The court by its decree did nothing more than follow the strict construction of the provision in the

deed in decreeing that said strip be kept vacant. On the questions before us on this appeal the decree of the superior court was right. The court had jurisdiction to issue its mandatory injunction requiring the removal of the obstructions on the strip and to order that it be kept vacant. *Feitler v. Dobbins*, 263 Ill. 78.

For the reasons given, the decree of the superior court will be affirmed.

*Decree affirmed.*

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JEANNETTE WILLIAMS *et al.* Appellees, vs. JOHN H. WILLIAMS *et al.*—(MAGGIE A. CASSEM, Exrx., Appellant.)

*Opinion filed October 16, 1914.*

1. RES JUDICATA—in equity, former recovery must be pleaded to entitle record of former case to admission. In equity the record of a former adjudication cannot be introduced in evidence by the defendant unless the former adjudication has been set up or relied upon by answer or plea, if an opportunity for doing so has been afforded the defendant.

2. SAME—burden of establishing an estoppel is on him who invokes it. The burden of establishing an estoppel is upon him who invokes it, and where a judgment in a former proceeding is relied upon, it must appear that the court had jurisdiction to, and did, adjudicate the precise question claimed to be settled.

3. SAME—what recital in decree does not show jurisdiction of person. Jurisdiction of the person of a defendant is not shown by a recital in the decree that he answered the bill, where the record shows he was insane before his appearance was entered and an answer filed by an attorney, who entered the appearance at the request of the insane defendant's wife and who does not appear from the record to have been appointed guardian *ad litem*.

4. INSANE PERSONS—when conveyance will be set aside without requiring return of consideration. Where an insane grantor does not receive the consideration paid nor any benefit therefrom the conveyance will be set aside in equity without any return or offer to return the consideration, even though the grantee may not have known the grantor was insane.

APPEAL from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

C. E. BOTSFORD, and FRANK A. MCCARTHY, for appellant.

CHARLES C. SPENCER, and JESSE WILCOX, for appellees.

MR. JUSTICE FARMER delivered the opinion of the court:

Appellees filed their bill in the circuit court of Cook county for the partition of a lot therein described, in the city of Chicago, referred to in the briefs as the Yale avenue property. The bill alleges that the three complainants and two defendants are the only surviving children of John Q. Williams, who died intestate October 31, 1903, owning in fee simple the lands sought to be partitioned. In addition to the five children he left surviving him his widow, Eliza J. Williams. The bill alleges that on or about August 22, 1900, Williams became totally insane and continued in that condition until his death, and that while so insane he and his wife, on or about September 4, 1900, executed and delivered a trust deed, which was duly recorded, purporting to convey the premises sought to be partitioned to George P. Bay, as trustee, to secure a note for \$3000, payable three years after date, with interest at five and one-half per cent per annum. The bill alleges, on information and belief, the note has been fully paid and canceled, but if unpaid the holder or owner is unknown to complainants. The bill further alleges that on the 26th of October, 1900, while said Williams was insane, he conveyed to his wife, Eliza J. Williams, the premises described in the bill, but that the deed was made without any consideration therefor, and because of the insanity of the grantor was, and is, void and voidable. It is further alleged that on or about March 20, 1901, said Eliza J. Williams and John Q. Williams, while the latter was insane, conveyed the property by quit-claim deed

to Randall Cassem, but that said deed was without consideration, and that at the time of its execution and delivery said Cassem knew Williams was demented and insane; that upon receipt of the deed said Cassem took possession of the property and has since continued in possession, receiving the issues and profits thereof, until his death, November 14, 1909; that said Cassem died testate and by his will devised all his real estate to Maggie A. Cassem, who was appointed sole executrix of the will; that said will has been duly probated and said Maggie A. Cassem now claims to own said premises as devisee of Randall Cassem, and since his death has received the rents and profits therefrom. The bill further alleges that on August 22, 1901, Williams was adjudged insane by the county court of Cook county, and by the judgment of that court it was declared he had been insane for a period of one year prior to the entry of the judgment. The bill prays that the trust deed to George Bay, trustee, the warranty deed from Williams to his wife, Eliza J. Williams, and the quit-claim deed from Eliza J. Williams and John Q. Williams to Randall Cassem, be declared null and void and removed as clouds upon the title of said children of said John Q. Williams, and that the premises be partitioned among them according to their respective rights and interests, and that Maggie A. Cassem be required to account to them for the rents and profits therefrom.

All the defendants to the bill were defaulted except Maggie A. Cassem, who answered, individually and as executrix of the will of Randall Cassem, deceased. Her answer denied that John Q. Williams was at the time of his death the owner of the premises and that his children inherited the same from him; denied Williams became insane August 22, 1900, to such an extent as to be incapable of understanding and transacting business, and alleged that from said date until his death Williams was of sound and disposing mind and memory, engaged in ordinary business affairs, negotiating loans and buying real estate, and was

regarded by those with whom he dealt as an ordinarily careful and prudent business man. The answer admitted the making of the trust deed to Bay, and averred the notes it was given to secure were assumed by Cassem as part of the consideration for the conveyance from the Williams to him and that he afterwards paid off the notes. The answer denied the conveyance from Williams to his wife, October 26, 1900, was without consideration or that the deed was void, and averred that at the time the deed was made to Cassem Eliza J. Williams owned the land in fee and had full power and authority to convey the same. The answer averred that said Williams was, at the time he and his wife made the deed to Cassem, of sound mind and memory, and that at the time of the conveyance Cassem had no notice or knowledge of any claim that Williams was insane. The answer further denied that the conveyance was made without consideration, and averred Cassem paid a valuable consideration for the conveyance and in addition assumed and agreed to pay the notes secured by the trust deed on the premises, and that he did thereafter pay and discharge the same. The answer admitted Cassem was in possession of the premises until his death, and that since that time Maggie A. Cassem, his sole devisee, has been in possession thereof.

Complainants' proof was to the effect that John Q. Williams was of unsound mind as far back as 1899; that he never recovered, and died in the Northern Illinois Hospital for the Insane at Elgin, Illinois, where he was committed by the order and judgment of the county court of Cook county August 22, 1901.

Defendant Maggie A. Cassem offered in evidence the files of case No. 215,253 in the superior court of Cook county, entitled, *Robert Williams v. John Q. Williams et al.* That was a bill for partition and was filed June 29, 1901. Originally John Q. Williams owned the property sought to be partitioned in this case in severalty. It is referred to in the briefs as the Yale avenue property. He also owned an



undivided one-sixth interest in three other lots located at different places in the city of Chicago. On the 26th of October, 1900, he executed a warranty deed to his wife, Eliza J. Williams, for the Yale avenue property, and on the 20th of March, 1901, he and his wife united in a quit-claim deed conveying the Yale avenue property and Williams' interest in the other property to Randall Cassem. On June 29, 1901, Robert Williams filed a bill to partition the property other than the Yale avenue property. Said complainant was a brother of John Q. Williams. The bill alleged that the complainant and John Q. Williams each became seized of the undivided one-sixth of the premises described in the bill by conveyance from one Hugh Williams; that John Q. Williams, after becoming so seized of said one-sixth, together with his wife, executed a trust deed on his interest in two of the lots described in the bill to secure an amount of money unknown to complainant. The bill further alleged that John Q. Williams and his wife, Eliza, had made a deed of his undivided interest in the premises to Randall Cassem, but that they claimed said conveyance was not their deed and was not intended to convey said real estate. After setting out the interest claimed by the parties in the premises, the bill alleged John Q. Williams' undivided one-sixth was subject to whatever rights existed by virtue of the trust deed and the conveyance to Randall Cassem. Subsequently an amendment was filed alleging that since the filing of the bill John Q. Williams had been declared insane by the county court of Cook county and that a guardian *ad litem* should be appointed for him. The record shows the appearance of John Q. and Eliza J. Williams was entered by their solicitor, S. A. French. An answer to the bill was filed by French, as guardian *ad litem* for John Q. Williams. The answer alleges respondent is insane and now an inmate of the Northern Hospital for the Insane at Elgin, Illinois, and further alleges that the deed from respondent and wife to Cassem, dated March 20, 1901, was

made without any consideration and was procured by Cassem by fraud and deceit at a time when respondent was mentally incompetent, and that said deed ought to be set aside. The answer prays the same relief as though a cross-bill had been filed. Eliza J. Williams answered the bill, alleging she and her husband were fraudulently induced to execute and deliver the deed to Randall Cassem; that it was procured by him by fraud and deceit, without consideration, and should be declared void and of no effect as against her and John Q. Williams. Randall Cassem and Adelia Cassem (presumably the same person as Maggie A. Cassem) were, among others, made defendants to the bill and jointly answered the same, claiming to own the one-sixth interest in certain premises described in the bill by virtue of a conveyance from John Q. Williams by deed dated March 20, 1901, and other instruments not of record. The answer denies that said deed was not the deed of John Q. Williams and his wife, and denies the allegation of the bill that it was not intended to convey their interest in the real estate to Randall Cassem. As to the other allegations in the bill the answer asks that strict proof be required.

While the Williams' conveyed to Cassem by the same deed the Yale avenue property and the other property referred to in the partition suit in the superior court, the validity of the deed as a conveyance of the Yale avenue property was not raised, for the reason that suit related only to the partition of the lots in which John Q. Williams had owned a one-sixth interest and which he and his wife purported to convey to Cassem by the same deed by which they conveyed the Yale avenue property to the same grantee.

The cause was referred to the master in chancery, who took the testimony and reported the same, together with his conclusions thereon, to the court. The master found that Eliza J. Williams and John Q. Williams did not, at the time they made the deed to Cassem, understand they were conveying to him their undivided interest in the property; that

they did not expect or intend to make a conveyance thereof and that it was improperly inserted in the deed as part of the property intended to be conveyed. The master further found, from the evidence, that John Q. Williams was not, on March 20, 1901, in such mental condition as to be able to make a distinct and definite agreement in regard to the sale of his undivided interest in said property. Exceptions to the master's report were sustained by the chancellor and a decree entered finding the deed of March 20, 1901, was a good and valid conveyance of the undivided interest of John Q. Williams in the property sought to be partitioned in that case, and that by virtue of said deed Randall Cassem was seized of and entitled to a one-sixth interest in said premises as tenant in common with the owners thereof. No appeal was prosecuted from that decree.

The bill for partition by Robert Williams in the superior court case contains no allegation that John Q. Williams was not of sound mind when he joined with his wife in the deed to Cassem. The allegation was that the grantors in that deed claimed it was not their deed and was not intended to convey their interest in the real estate sought to be partitioned. The answer of French, as guardian *ad litem* of John Q. Williams, alleged he was mentally incompetent to make the deed, and this is the only place in the pleadings in that case where the mental condition of Williams was mentioned. The proof taken by the master and embraced in his report to the chancellor shows that evidence was heard upon the question of Williams' mental condition at the time the deed was made.

The evidence in the case at bar was heard in open court by the chancellor and a decree entered as prayed in the bill. The decree found that the notes and the trust deed given to Bay by John Q. Williams to secure the notes were void and the trust deed was not a lien upon the premises; that Williams received no consideration for the notes nor any advantage from the payment of them by Randall Cassem,

by whom the evidence shows they were paid. The decree finds that the deed from Williams to his wife, October 26, 1900, was invalid because he was insane at the time it was made, and that the deed from Williams and wife to Randall Cassem, March 20, 1901, was without consideration; that Williams was insane at the time it was made and that Cassem knew he was insane. The decree further finds that the proceedings and decree in the superior court case did not determine or adjudicate any of the issues in this cause, and that said decree is not *res judicata* of any issue in this case and creates no estoppel against complainants. The decree further finds that the superior court never acquired jurisdiction of the person of John Q. Williams in the case in that court, and that the decree was not binding on him on the issues involved in that proceeding.

Although the authorities are not harmonious on the question, their weight seems to be that when a former case between the same parties is relied upon as *res judicata*, it must, at least in equity, be pleaded when an opportunity to plead it has been afforded defendant. *Gray v. Gillilan*, 15 Ill. 453, relied on by appellant, was an action of assumpsit, in which there was a special plea of former recovery. A replication to that plea alleged the repliant offered no proof in the former proceeding, and on demurrer the replication was held good. The record in the former case was received in evidence. The court reviews many authorities, English and American, comments on the conflict between them, and says the general rule is that a former recovery will only operate as a bar when specially pleaded. While it does not appear to have been necessary to a decision of that case, the court, in the course of its discussion, says, substantially, that the record in a former proceeding may be received in evidence under the general issue and when so received is conclusive. *Sheldon v. Patterson*, 55 Ill. 507, was a bill to foreclose a mortgage, and defendant offered in evidence the record of a judgment in a former proceeding without hav-

ing specially pleaded it. The judgment in the proceeding, the record of which was offered in evidence, was not rendered until after the pleadings were closed in the case in which it was offered. The trial court disregarded the former record, and this court held that was erroneous. The court quoted the rule announced in *Duchess of Kingston's case*, 20 How. St. Tr. 538, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court, but said many courts had recognized a modification of that rule, viz., that if a party have an opportunity to set up a judgment by pleading it but does not do so, then it is evidence but not conclusive. This court did not agree to this modification, and expressed the view that the weight of authority in this country is in favor of the proposition that when a former recovery is given in evidence its effect is the same as if it had been specially pleaded.

The foregoing cases are the decisions in this State relied upon by appellant. To our minds they are not conclusive, for in neither of them was the question whether the record of a former recovery may be received in evidence in actions in equity without specially pleading it when an opportunity has been afforded to do so, involved and necessary to a decision. The suit of *Gray v. Gillilan*, *supra*, was an action at law, and a former adjudication was specially pleaded. *Sheldon v. Patterson*, *supra*, was a suit in equity, and the former recovery relied upon by the defendant in that case was had after the pleadings were closed. In *Wann v. McNulty*, 2 Gilm. 355, it was held a former verdict and judgment may be given in evidence in an action at law under the general issue, but in such case it is only *prima facie* evidence and not conclusive, while if specially pleaded it would be a complete bar. In *Hahn v. Ritter*, 12 Ill. 80, the action was in tort, and the court held a former recovery must be specially pleaded and could not be given in evidence under

the general issue. In *Gerber v. Gerber*, 155 Ill. 219, *Evans v. Woodsworth*, 213 id. 404, and *Mettler v. Warner*, 243 id. 600,—all suits in equity,—it was held that if the record of a former suit is relied upon it must be specially pleaded. In *Consolidated Coal Co. v. Peers*, 166 Ill. 361, which was an action in assumpsit, plaintiffs recovered in the trial court and defendants appealed. It was claimed by plaintiffs in their briefs in this court that the question at issue had been adjudicated in former litigation between the same parties and was *res judicata*. The court said the question of a former recovery was not raised by the declaration or by any replication and could not be considered. In *Turley v. Turley*, 85 Tenn. 251, (opinion by Lurton, J.,) and *Lyon v. Talmadge*, 14 Johns. 501,—both suits in equity,—it was held a former decree, to be availed of as a defense, must be specially set up and relied upon by plea or answer. Other authorities might be cited to the same effect, and a considerable number of other cases decided by courts of the highest respectability will be found holding the record of a former recovery may be given in evidence without being specially pleaded. This court appears to have adopted and applied the rule, in equity at least, as late as 1910, (*Mettler v. Warner, supra*,) that a former adjudication, to be availed of as a defense, must be set up and relied upon in the answer or by plea. This rule was not applied in *Sheldon v. Patterson, supra*, but in that case the suit had been commenced and the pleadings closed before the former judgment relied on was rendered.

In conformity with what we understand is the rule adopted by this court and the courts of last resort in some other States, we are disposed to hold the record of the superior court case offered in evidence by appellant, not having been set up or relied upon in the answer or by plea, was inadmissible as evidence. Disregarding that record, then there is no proof to rebut the testimony of appellees in support of the allegations of the bill. But if, as contended by

appellant, the record in the former proceeding was admissible without being set up and relied upon by plea or answer, still we think the chancellor was warranted in his refusal to give the record in the superior court case any consideration in this case. The burden of establishing an estoppel is upon him who invokes it, and where a judgment in a former proceeding is relied upon it must appear the court had jurisdiction to, and did, adjudicate the precise question. *Sawyer v. Nelson*, 160 Ill. 629; *Geary v. Bangs*, 138 id. 77; 24 Am. & Eng. Ency. of Law, 773.

The proof abundantly shows that John Q. Williams was of unsound mind as far back as 1899. A former employer of said Williams, who had known him more than twenty years and in whose employ he had been for many years prior to June, 1900, testified Williams' mental condition became unsound in 1899; that no reliance could be placed upon him though he had previously been a very capable and reliable man. From June, 1899, to June, 1900, Williams' employer carried him on the pay-roll but he was unable to perform any service, because, as the employer testified, "He was crazy,—that was all." He testified Williams' mind began to fail in 1898. The salary for Williams was paid by his employer to Williams' wife and children. His mental condition was apparent to anyone who saw or talked with him. That Williams was of unsound mental condition from as early as 1899 was testified to by witnesses who were brought into association with him and by competent physicians who had treated him. On the 22d of August, 1901, Williams was adjudged insane by the county court of Cook county and committed to the hospital for the insane at Elgin, Illinois, where he died October 31, 1903. The verdict and judgment recited that his age was forty-seven years and that his disease was of one year's duration.

The bill in the superior court case was filed June 29, 1901. After Williams was adjudged insane the bill was amended to show that fact and the prayer was amended

by asking that a guardian *ad litem* be appointed for him. There was no summons in the record and files of the case offered in evidence and no recital in the decree that any summons was ever issued for or served upon Williams. The record shows the appearances of Eliza J. and John Q. Williams were entered by S. A. French, their solicitor. French was called as a witness in this case, and testified he entered the appearance of John Q. Williams at the request of Eliza J. Williams, and that he had no recollection that he ever saw Williams. He transacted the entire business with Eliza J. Williams. He did not remember whether he was ever appointed guardian *ad litem* for Williams. Eliza J. Williams was not the mother of John Q. Williams' children. She was a second wife, who had been his housekeeper and whom he married in 1899, about two years after the death of his first wife. The record does not show the appointment of anyone as guardian *ad litem*. The decree recites the cause came on to be heard upon the bill, the answer of John Q. Williams, the default of the other defendants whose appearances had been entered, and the report of the master to whom the cause had been referred. The decree does not expressly find the court had jurisdiction of the person of John Q. Williams but recites he had answered the bill. At the time his answer to the bill was filed by French, Williams had been adjudged insane, and the proof shows he had been in that condition for a long time previously. The proof in this record shows he was insane long before his appearance was entered by French. After an amendment to the bill in the superior court case was filed setting up that since the bill was filed Williams had been adjudged insane, so far as the record shows there was no guardian *ad litem* appointed for him. The decree does not show Williams' appearance was entered before answer filed, but the only recital in it to show jurisdiction of his person is that he had answered the bill. The answer alleged he was insane and had been committed to an asylum. The



court could not acquire jurisdiction of his person by an attorney entering his appearance or filing an answer for him. (*United Workmen v. Zuhlke*, 129 Ill. 298; *Dickison v. Dickison*, 124 id. 483; *Greenman v. Harvey*, 53 id. 386.) In our opinion the record overcomes any presumption from the recital in the decree that the court had jurisdiction of the person of John Q. Williams. *Clark v. Thompson*, 47 Ill. 25.

Appellant contends that as part of the consideration for the conveyance to Cassem he paid off notes secured by the trust deed to Bay aggregating \$3000, and that in any event it was erroneous to set aside the conveyance without any return, or offer to return, of the consideration paid for the conveyance. The decree finds, from the evidence, that long prior to August 22, 1900, John Q. Williams was so insane as to be incapable of understanding the nature of any business he might engage in, and that this condition continued until his death; that the trust deed, and the notes secured by it, were invalid and did not constitute any lien upon the premises, and that Williams received no consideration for their execution nor any advantage from their payment by Cassem. The decree further finds that October 26, 1900, (the date Williams made the deed to his wife,) he was insane and that the conveyance was made without consideration; also that March 20, 1901, (the date the deed was made by Williams and wife to Cassem,) Williams was insane and was known to be so by Cassem, and that there was no consideration for the conveyance. The evidence upon which these findings were made is uncontradicted, if we disregard, as we think must be done, the record in the superior court case.

While the rule that a contract will not be rescinded unless the party in whose favor the rescission is awarded return what he has received under the contract is, in general, applicable only to persons *compos mentis*, (*Ronan v. Bluhm*, 173 Ill. 277,) it will also be applied to a case where the

grantee in good faith, before the grantor has been adjudged insane and without any knowledge of his insanity, purchases land and pays the grantor the consideration therefor. But the rule is otherwise if the insane grantor receives no benefit from the consideration paid. In such case the conveyance will be set aside without requiring the return, or offer to return, of the consideration, although the grantee did not know the grantor was insane when the deed was made. This question was before this court in *Jordan v. Kirkpatrick*, 251 Ill. 116, where the court said: "The reason given in the cases for requiring the consideration to be returned where the lunatic has received the benefit of it is, that to refuse to do so would be allowing the lunacy to be the means of perpetrating a fraud. Where the benefit of the consideration is not received by the lunatic the reason upon which the rule is based does not exist, and in view of the difference in circumstances and opportunities of the parties it would seem in harmony with sound principles of justice that the lunatic, having no responsibility for the transaction and receiving no benefit therefrom, should receive the protection of the court of equity and the loss should be made to fall on the party dealing with the lunatic." The same rule is applied where the grantee has notice of the grantor's insanity and the consideration paid is wasted and lost by him, or where the consideration paid is so inadequate as to evince an intention of the grantee to take advantage of the grantor's infirmity to cheat and defraud him. *Hardy v. Dyas*, 203 Ill. 211; *Amos v. American Trust and Savings Bank*, 221 id. 100; *Clay v. Hammond*, 199 id. 370.

The decree of the circuit court is affirmed.

*Decree affirmed.*

ARTHUR A. PECOY, Plaintiff in Error, *vs.* THE CITY OF CHICAGO *et al.* Defendants in Error.

*Opinion filed October 16, 1914.*

1. POLICE PENSIONS—*pensions are in the nature of bounties of the government.* Pensions are in the nature of bounties of the government, which it has the right to give, withhold, distribute or recall at its discretion; and this is true although the party claiming the right to a pension may have had a percentage of his salary applied to the pension fund.

2. SAME—*person acquires no vested right to the police pension fund as against subsequent change in the law.* The fact that at the time a person became a member of the police force the law then in force entitled him to a pension after ten years' service does not give him a vested right to a pension under such conditions, regardless of a subsequent change in the law with respect to the term of service and other conditions with which it is not claimed he has complied.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. THOMAS G. WINDES, Judge, presiding.

A. B. CHILCOAT, for plaintiff in error.

WILLIAM H. SEXTON, Corporation Counsel, and JOHN W. BECKWITH, (JOSEPH F. GROSSMAN, of counsel,) for defendants in error.

Mr. JUSTICE VICKERS delivered the opinion of the court:

Arthur A. Pecoy filed a petition in the circuit court of Cook county against Carter H. Harrison, mayor, and certain other persons constituting the board of trustees of the police pension fund, praying for a *mandamus* commanding the respondents to enroll the name of the petitioner as one of the beneficiaries of the police pension fund of Chicago, and for an order requiring the payment to him, out of the fund set apart as said pension fund, of an annual pension of \$600 per year from the date of petitioner's appli-

cation for said pension during the remainder of his life. The respondents appeared and filed a demurrer to said petition, which was sustained. The petitioner elected to abide by his petition, and the court dismissed it and rendered judgment against him for costs. On the ground that a construction of the constitution is involved the petitioner has sued out a writ of error from this court to obtain a review of the action of the circuit court in sustaining the demurrer and dismissing his petition.

The petition alleges that plaintiff in error was legally appointed a police patrolman in the police department of the city of Chicago on the third day of June, 1887, and that he took the oath of office and entered upon the duties of such police patrolman at a salary of \$1000 per annum, payable in installments of \$83.33 per month, and continued in the service until October 26, 1897, when, as he alleges, he was wrongfully dropped from the pay-roll. At the time the plaintiff in error was suspended he had served a few months over ten years, and his petition is based on the theory that under the law ten years' continuous service and continuous contribution to the police pension fund entitle him to be enrolled as a pensioner. Whether this contention is well founded is the controlling question presented for our consideration.

Section 7 of an act of the legislature approved May 24, 1877, and as amended in 1879, (Laws of 1879, p. 74,) reads as follows: "Any person who shall have served in either the police or fire departments of said city or village for the full term of ten (10) years, and shall have paid into the fund hereby provided for all assessments regularly made upon him by the board of trustees as required by this act and the regulations of said board of trustees passed in pursuance of this act, and shall have complied with all the rules and regulations lawfully established by the board of trustees in the same manner, as if such person was an active member in said police or fire department,

may continue his membership in this organization, and be entitled to the benefits of this fund after he shall have ceased to be a member in either said police or fire department, by complying with all the provisions of this act, relative to the payment of assessments, etc., the same as prior to his ceasing to be a member of said department, and the widow or children of such person shall be entitled to all benefits hereby secured to other members of this organization."

The above statute was in force at the time plaintiff in error was appointed a police patrolman. His contention is that his status in respect to the pension fund was established at the time he entered the service, and that if he continued in the service until he became entitled to a pension under the law as it existed at the time of his appointment, he has a right to be placed on the pension roll even though the law has been modified or repealed after his appointment. He contends that the law as it existed at the time he entered the service, in regard to a pension, entered into and formed a part of the contract of his employment, and that his rights to the benefits which would accrue under the then existing statute were vested property rights, of which he could not be deprived by any subsequent act of the legislature. This argument cannot be sustained. Pensions are in the nature of bounties of the government, which it has the right to give, withhold, distribute or recall at its discretion. (*United States v. Teller*, 107 U. S. 64; *Frisbee v. United States*, 157 id. 160; *Eddy v. Morgan*, 216 Ill. 437.) This rule is not changed by the circumstance that plaintiff in error claims to have contributed one per cent of his salary to such fund. The alleged contribution was not, in fact, a payment by him. He accepted the appointment of police patrolman with the knowledge that one per cent would be deducted each month and placed in the pension fund. The money was never paid to him, and the city simply transferred one per cent of the

salary from one fund to another, and continued to hold it as a special fund to meet the disbursements under the Police Pension law. (*Pennie v. Reis*, 32 U. S. 465; *State v. Trustees*, 121 Wis. 44.) In 1887 the legislature passed an act revising the Police Pension law, section 3 of which provides that "whenever any person, at the time of the taking effect of this act, or thereafter, shall have been duly appointed and sworn, and have served for the period of twenty years or more upon the regularly constituted police force, \* \* \* said board shall order and direct that such person shall, after becoming fifty years of age and his service upon such police force shall have ceased, be paid from such fund a yearly pension," etc. (Laws of 1887, p. 123.) This act, it will be noted, applies to persons who, like plaintiff in error, entered the service prior to the date it became effective. Section 12 of the act of 1887 provides that thereafter no payment shall be made under the prior acts, but that all persons entitled to the benefits of such prior acts shall be entitled to the benefits provided in the later act. All rights previously accrued under the earlier statute were thus saved by section 12, and it was manifestly the clear intention of the legislature that the act of 1887 should supersede the act of 1877 in all cities having a population of over fifty thousand. That the act of 1887 superseded the act of 1877 and the amendatory act of 1879 as to cities of the class of Chicago was in effect decided by this court in *Eddy v. People*, 218 Ill. 611. Under the later act, which was in force in 1897, when plaintiff in error claims his right to a pension accrued, the board of trustees was empowered to grant pensions in the following cases: (1) Whenever any person, at the time of taking effect of this act or thereafter, shall have been duly appointed and sworn and have served for a period of twenty years or more upon the regularly constituted police force of the city and shall have become fifty years of age; (2) whenever any person, while serving as

a policeman, shall become physically disabled in consequence of the performance of his duty as a policeman; (3) whenever any member of the police force shall lose his life in the performance of his duty or receive injury from which he shall thereafter die, leaving a widow, or child or children under the age of sixteen years; (4) whenever any member of the police force shall die after ten years' service and while still in the service of the city, leaving a widow, or child or children under the age of sixteen years.

There is no pretense that plaintiff in error is entitled to a pension under any of the provisions of the act of 1887. The claim made by plaintiff in error that the act of 1887 deprives him of his property without due process of law cannot be sustained. (*Eddy v. Morgan, supra.*) In the case last above cited this court, on page 449, said: "Appellees argue this case as though it were a matter of contract or vested right, while, in fact, it is a mere matter of largess or bounty. A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease.—*Walton v. Cotton*, 19 How. 355; *Frisbee v. United States*, 157 U. S. 160; 26 Am. & Eng. Ency. of Law, (2d ed.) 658."

The petition fails to disclose a clear legal right to the relief sought, and the court did not err in sustaining the demurrer thereto and in dismissing the same.

The judgment of the circuit court of Cook county is affirmed.

*Judgment affirmed.*

THE TRUSTEES OF SCHOOLS, Appellees, vs. FANNIE  
McMAHON, Appellant.

*Opinion filed October 16, 1914.*

1. SCHOOLS—*trustees of schools may bring condemnation suit at request of board of education.* A proceeding to condemn land for a school site may be brought by the trustees of schools at the request of the board of education, and it is immaterial to the defendant whether the amount of the condemnation judgment is paid by the board of education in the name of the trustees of schools or otherwise.

2. SAME—*additional land for school ground may be acquired without a vote of the people.* Where a school site has been selected and is occupied by a school building in use for school purposes, the board of education may, without a vote of the people, acquire additional land by purchase or condemnation, whenever, in its judgment, such additional land is necessary for the proper conduct of the school.

APPEAL from the County Court of DuPage county; the Hon. CHARLES D. CLARK, Judge, presiding.

BULKLEY, GRAY & MORE, for appellant.

CHARLES W. HADLEY, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

The school house in school district No. 44, township 39, north, range 11, east of the third principal meridian, in DuPage county, is located on lot 7 of the original town of Lombard. Adjoining this property on the east is lot 6, owned by appellant, Fannie McMahon. Lot 7 had been selected as a site for the school building and a two-story, four-room brick building erected thereon some years ago. At a meeting of the board of education of the district held in December, 1912, it was determined that the present school grounds were inadequate and that additional premises should be obtained, and it was determined to purchase the property of appellant for a sum not to exceed \$3800.



The board of education was unable to agree with appellant as to the purchase price, and it thereupon passed a resolution requesting the trustees of schools of that township (the appellees here) to institute condemnation proceedings to acquire the premises. Condemnation proceedings were thereupon instituted by the appellees in the county court of DuPage county, which resulted in a verdict fixing the compensation to which appellant was entitled at \$3811.25 and judgment was rendered accordingly. From that judgment appellant has prosecuted this appeal.

It is urged that there is no authority for the trustees of schools, at the request of the board of education, to condemn, and that the judgment directing the trustees to pay for the land condemned is void. The trustees of schools, and not the board of education, are the proper parties to petition for the condemnation of land for the school site. (*Wilson v. School Directors*, 81 Ill. 180; *Banks v. School Directors*, 194 id. 247.) The board of education having requested the trustees of schools to institute condemnation proceedings, this action was properly prosecuted by them. As the property condemned cannot be taken until the compensation awarded has been paid, it is immaterial to appellant whether this payment is made by the board of education in the name of the trustees of schools, or otherwise.

The two principal contentions made by appellant are, first, that a board of education cannot acquire property for school purposes without submitting the question whether the property shall be acquired to a vote of the people; and second, that there is no authority for the condemnation of additional grounds after a site has been acquired and a school building erected thereon.

The statute authorizing boards of education to acquire property for school purposes is section 127 of an act to establish and maintain a system of free schools. (Laws of 1909, p. 377.) That section, so far as material here, is as follows:

"Sec. 127. The board of education shall have all the powers of school directors, be subject to the same limitations, and in addition thereto they shall have the power, and it shall be their duty: \* \* \*

"*Fifth*—To buy or lease sites for school houses with the necessary grounds: *Provided, however*, that it shall not be lawful for such board of education to purchase or locate a school house site, or to purchase, build or move a school house, unless authorized by a majority of all the votes cast at an election called for such purpose in pursuance of a petition signed by not fewer than five hundred legal voters of such district, or by one-fifth of all the legal voters of such district: *And, provided, further*, that if no locality shall receive a majority of all the votes cast at such election, the board of education may, if in their judgment the public interest requires it, proceed to select a suitable school house site; and the site so chosen by them in such case shall be legal and valid the same as if it had been determined by a majority of all the votes cast; and the site so selected shall be the school house site for such district; and said district shall have the right to take the same for the purpose of a school house site, either with or without the owner's consent, by condemnation or otherwise."

In considering a statute almost identical in its terms, in *Thompson v. School Trustees*, 218 Ill. 540, we said: "It was not essential that an expression of the will of the voters as to the amount which should be expended in the purchase of the site or in the construction of the building or as to the area of the plat of ground to constitute a site for the building should have been called for in the notice for the election or given by the electors at the election. These matters are committed to the judgment and discretion of the board of education, subject to the limitation found in the statute as to the power of the board to levy and collect taxes. Such is, in principle, decided in *People v. Chicago and Northwestern Railway Co.* 186 Ill. 139, and

*People v. Peoria and Eastern Railroad Co.* 216 id. 221."

In the same case it was also urged that the statute in express terms declared it to be unlawful for the board of education to purchase a site for a school house unless the authority to purchase had been submitted to the voters, but we said: "A superficial reading of section 31 would induce the conclusion that this contention is well grounded, but when the proviso to the section and section 32 are read and given meaning and effect it clearly appears that an affirmative vote of the electors selecting premises as the site for the school house invests the board of education with power to acquire that site, either by purchase or by the exercise of the right of eminent domain."

The statute under consideration here also provides that it shall not be lawful for a board of education to purchase or locate a school house site unless authorized by a majority of all the votes cast at an election called for such purpose, etc., but when the entire fifth clause is considered it is clear that the power is conferred upon the board to purchase or condemn sites for school houses with the necessary grounds, and that the only limitation placed upon this power is that the question as to the location of the site must be submitted to the voters. After the site has been selected in the manner prescribed by said fifth clause the statute does not require the board to submit to the voters the question how much ground shall be acquired for the site. That question is one which is by the statute left to the discretion of the board.

It necessarily follows that if the board of education, after a site has been selected in accordance with the statute, has the power, without a vote of the people of the district, to determine the area of the site to be acquired and to purchase or condemn the same, it has the power to purchase or condemn additional grounds without a vote of the people of the district, whenever, in the judgment of the board, such additional grounds are necessary for the

proper conduct of the school. The board of education having determined that additional grounds were necessary, it had the right to proceed to purchase or condemn the same without submitting the question to a vote of the people.

The judgment of the county court is affirmed.

*Judgment affirmed.*

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AMIE I. ADAMS, Appellant, vs. JOHN GORDON, Appellee.

*Opinion filed October 16, 1914.*

1. APPEALS AND ERRORS—*bill to establish a perpetual easement in land involves a freehold.* A bill to establish complainant's right to the use of water piped from a well on the defendant's land and to go upon the land to make repairs to the pumping engine, pipes, etc., is a bill to establish a right in the nature of a perpetual easement in land, and an appeal from a decree dismissing the bill lies to the Supreme Court upon the ground that a freehold is involved.

2. CONTRACTS—*resort may be had to circumstances surrounding execution of a contract.* The object in construing a written instrument is to make it speak the true intention of the parties, and where any doubt exists as to its meaning, resort may be had to the circumstances surrounding its execution.

3. EASEMENTS—*rule when owner divides land and sells a part.* Where the owner of land divides it and sells one part, he by implication includes in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form they were at the time he transferred the property.

4. SAME—*when purchaser has a right to assume that easement goes with the land.* Where a person has been a tenant of property for several years and has had the use of water piped from a well on adjoining premises, together with the right to go upon the adjoining land to attend to the pumping engine, pipes, etc., she has the right to assume, on purchasing the property from the grantee of the owner of the adjoining land, that the easement, which such owner had regarded as appurtenant to the land and as passing under the lease, will pass with the deed to the land.

APPEAL from the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding.

Appellant filed her bill in chancery in the circuit court of Lake county, Illinois, against appellee, for an injunction to restrain him from interfering with her in the exercise of her rights which she claimed in the nature of an easement in certain water facilities and a way thereto, situated on the lands of appellee. A demurrer was sustained to the bill, and appellant electing to abide by her bill, a decree was entered dismissing the bill for want of equity. She prayed and perfected an appeal to the Appellate Court for the Second District, which has transferred the cause to this court pursuant to the statute, for the reason that a freehold is involved.

It appears from the allegations of the bill that prior to November 29, 1911, appellee was the owner of a tract of about one hundred or more acres of land situated on what is known as Deerpath avenue, in the vicinity of Lake Forest, Illinois. November 29, 1911, he entered into a contract with John F. Tracy for the sale of a portion of this land, in which he contracted, among other things, that the purchaser should have the right to the use of the well located on his adjacent property, together with the pump, gasoline engine and tank situated thereon, until such time as public water mains should be installed in Deerpath avenue, with the right to use a path, not exceeding eight feet in width, from a gate on the west line of the property leading in a direct line to the well, the purchaser to maintain the well, pump, engine and tank at his own expense and furnish water for the use of appellee without charge or expense to him, and should said Tracy fail to so maintain and furnish water, his right to the use of the well and pump might be terminated by the vendor and all obligations under the contract canceled. On the same day the contract was made appellee conveyed the land described in the contract to said Tracy by warranty deed, in which no reference whatever is made to the provision in the contract in relation to the use of water facilities as above set forth. At the time the

contract was made between appellee and Tracy appellant was a tenant on the property under a lease expiring on November 30, 1911. January 4, 1912, Tracy conveyed the land purchased by him to appellant by warranty deed in all respects the same as the deed he had received from appellee, the deed making no mention whatever of the easement contained in the contract between appellee and Tracy. Appellant alleges the omission of this matter was due to the mistake of the scrivener in drafting the deed, but she does not ask that the deed be reformed. For some years the water facilities located on appellee's land have been used by him and his tenants, including appellant, for the purpose of supplying the premises now owned by her with water for domestic purposes and to supply water for the stables, lawns and gardens thereon, said water facilities being absolutely necessary and essential to the full enjoyment of her premises. Appellant charges that one of the important factors inducing her to purchase the premises was the fact that she should have the right to the free and unobstructed use of the water facilities mentioned in the contract between said Tracy and appellee. The pump, pump house, tank and engine are located on appellee's premises about one hundred feet from the west line of appellant's property, and the water is conveyed from there to her premises and buildings by means of an underground pipe leading from the tank on appellee's property to the house, stable, lawn and garden on appellant's premises. The pipe is visible on appellee's land between the point where it leaves the tank and enters the ground, and also visible on appellant's premises where it emerges from the ground and connects with the faucets, plugs, flush-boxes and hydrants on her land. A view of the premises at the time of the purchase by Tracy and of her purchase from Tracy would have disclosed that the faucets, plugs, flush-boxes and hydrants on her property were connected with the tank on appellee's land, and that the pump, pump house, engine and

tank situated thereon were used as the means of supplying these premises with water, and that the water facilities thus provided were highly beneficial to her property. No public water mains have been installed or constructed in Deerpath avenue leading to this property, and it is indispensable to its use and enjoyment by appellant that she have the advantage of water facilities provided for it, situated on appellee's land. After appellant became a purchaser appellee permitted her to continue to use the water facilities for some time without protest and from time to time to make the necessary repairs thereon. Shortly before filing the bill he demanded of her the payment of \$50 which he claimed was due on a former tenancy by her, and when she refused to pay, on the ground that it was without any foundation, appellee refused to allow her servants to make repairs on the engine used for pumping water into the tank, locked the door to the pump house, shut the water off, forbade appellant or her servants to use the well or the pathway thereto and blockaded the same by installing posts and wires across the pathway, and threatened violence to appellant and her servants if they attempted to obtain water from the well or to use the pathway leading thereto. The bill prayed for an injunction enjoining the appellee from interfering with appellant's rights in the premises and in the use of the water, pump house, engine and tank and other water facilities as above set forth, and for general relief. A general demurrer was sustained to the bill, setting forth the above facts. Appellant elected to abide by her bill and a decree was entered dismissing the bill for want of equity. This appeal followed.

The errors assigned are, (1) that the court erred in sustaining the demurrer to the bill; and (2) that the court erred in dismissing appellant's bill for want of equity.

SHEPARD, McCORMICK & THOMASON, and JOHN D. POPE, (FERRY S. PATTERSON, of counsel,) for appellant.

ELAM L. CLARKE, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellant by her bill asserts and seeks to establish and maintain a right in the nature of a perpetual easement in the adjoining lands of the appellee in the use and maintenance of certain water facilities located thereon, by means of which her house, barn, garden and premises are supplied with water. This right, if it exists, is an easement appurtenant to an estate in fee, and a bill filed for the purpose of establishing such an easement involves a freehold, and the case was therefore properly transferred to this court. *Tinker v. Forbes*, 136 Ill. 221; *Foote v. Marggraf*, 233 id. 48; *Foote v. Yarlott*, 238 id. 54; *Espenscheid v. Bauer*, 235 id. 172.

Appellant insists that she is entitled to the benefits of the contract of November 29, 1911, between Tracy and appellee, and also that the water facilities on appellee's land constitute an open and visible easement appurtenant to her premises, which passed by the deed of conveyance of the land from appellee to Tracy and from Tracy to her. Appellee insists that no rights passed to appellant under the contract with Tracy, for the reasons it was never executed by Tracy, that it was a personal contract, and that it became merged into and extinguished by the deed subsequently made conveying the land to Tracy. The appellee further insists that in order for an easement to pass as appurtenant to land, it must be open, visible and continuous and such as does not require the interference by man. We do not deem it necessary to pass upon each one of these contentions separately, but the substance of each and all of these contentions will be given full consideration.

The object in construing and interpreting an instrument is to ascertain and make it speak the true intention and meaning of the parties at the time it was made, and where any doubt exists as to its sense and meaning, resort may



be had to the circumstances surrounding its execution, for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto. Without this knowledge it would be impossible to fully understand the meaning of an instrument or the effect to be given to the words of which it is composed. (*Goodwillie Co. v. Commonwealth Electric Co.* 241 Ill. 42.) This knowledge is almost as indispensable as that of the language in which the instrument is written, and a reference to the actual condition of things at the time as they appeared to the parties themselves will often afford the court great help in construing such language and arriving at the true intent and meaning of the agreement they have made. By referring to the situation of the parties and the condition of the premises at the time appellant became a purchaser of the same, we find she had been a tenant thereof for some years, the length of time not being stated in the bill, and during all of that time had used and enjoyed all of the privileges which she now claims as an easement appurtenant to her premises. In purchasing the property she had a right to assume and expect she was buying it in its then condition and would have the right to use and enjoy all of those necessary conveniences which had been placed thereon by the owner and were used in connection therewith and were recognized by the owner as being appurtenant to the premises and passing with a lease under which she had enjoyed the same as a tenant. The rule is, where the owner of lands divides his property into two parts and disposes of one part, he by implication includes in his grant all such easements in the remaining part as were necessary for the reasonable enjoyment of the part which he grants in the form in which it was at the time he transferred the property, the general rule of law being, that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. (*Newell v. Sass*, 142 Ill. 104; *Keegan v. Kinnare*, 123 id. 280;

*Foote v. Yarlott*, *supra*; *Feitler v. Dobbins*, 263 Ill. 78; *Martin v. Murphy*, 221 id. 632; *Hankins v. Hendricks*, 247 id. 517; *Powers v. Heffernan*, 233 id. 597.) And it is not necessary that the easement claimed by the grantee be absolutely necessary to the use and enjoyment of the property; "it is sufficient if it is highly convenient and beneficial therefor." (*Newell v. Sass*, *supra*; *Powers v. Heffernan*, *supra*.) Where an owner sells a portion of his land he is presumed to intend that the purchaser shall take it in its then condition. (14 Cyc. 1166.) This intention is to be sought, not in the undisclosed purpose of the vendor, but in what is manifest and implied from his acts. (*Liquid Carbollic Co. v. Wallace*, 219 Pa. 457; *Hopewell Mills v. Savings Bank*, 159 Mass. 519.) In *Feitler v. Dobbins*, *supra*, the rule is stated as follows: "The law applicable to the situation here is, that where the owner of entire premises arranges for ways, light, etc., for the benefit of the different parts or portions of the premises, and afterwards the premises are severed and the title vested in separate owners, each grant will carry with it, without being specifically mentioned, the rights and burdens and advantages imposed by the owner prior to such severance. The doctrine is founded upon the principle that the conveyance of a thing imports a grant of it as it actually exists at the time the conveyance is made, unless a contrary intention is manifested in the grant. This doctrine has often been applied by this court.—*Morrison v. King*, 62 Ill. 30; *Clarke v. Gaffney*, 116 id. 362; *Newell v. Sass*, 142 id. 104; *Hankins v. Hendricks*, 247 id. 517." The following are a few of the cases which will illustrate how that doctrine has been applied by the courts in analogous cases:

In *Larson v. Petersen*, 53 N. J. Eq. 88, it was held that a water pipe leading from a driven well in a yard to a sink in the kitchen of a dwelling house, there ending in a pump by which water could be habitually drawn from the well to the kitchen for domestic purposes, would pass

by a conveyance of the dwelling house, alone, by the owner of both house and yard, although the well and water pipe were both hidden from view, and that the same result would follow a simultaneous conveyance of the house to one person and the yard and well to another, if the latter took with notice of the connection between the well and pump. In this connection see, also, 14 Cyc. 1183, where the rule is stated to be as follows: "If the owner of land devises a system of pipes or conduits through which water is conveyed from a spring on one portion of his premises to another portion for the benefit of the latter and then alienates the portion to which the water is thus conveyed, the right to receive water through such pipes or conduits over the land conveyed will pass to the grantee by general words."

In *Ingals v. Plamondon*, 75 Ill. 118, a furnace flue projected eight inches through a party wall. The owner of the two lots divided by the wall sold one of them and afterwards sold the other. A question arose between the first and the second grantees as to the right to maintain the flue. The flue was shown to be necessary to the maintenance of the furnace and its existence apparent to the second vendee when the premises were purchased, and the easement was upheld as appurtenant to the premises.

In *Powers v. Heffernan*, *supra*, it was held that where the owner of a building, upon erecting a new building on an adjoining lot, uses the stairway and hall of the old building for many years as the only means of access to the second floor of the new building, an easement attaches in favor of the new building upon a sale of the old building, although the only reservation in the deed is the right to one-half the party wall between the two buildings. This holding is based on the principle that where the owner of a building, while he was seized of the entire title, made certain arrangements with reference to access, heat, light and air which are highly beneficial and convenient to the

use and enjoyment of the property and enhance its value, sells a portion of the building he sells it in its then condition, and each portion of the severed premises is subject to the burdens or advantages thereby imposed or conferred upon the other by the owner.

In *Foote v. Yarlott*, *supra*, we held that where the owner of a flat-building executed two trust deeds for the north and south halves of the building, respectively, and afterward installed a heating plant so as to heat the whole building, the heating plant being located on the north half, an easement was created in favor of the south half in the beneficial use and enjoyment of that part of the heating plant located in the north half, which right could be asserted by anyone who might become the owner of the south half under the trust deed. It was there said: "After the trust deeds were executed, and before the extension of the time of payment, the owner of the property put in the steam heating plant, with its pipes and radiators, to heat the entire building. While it was designed for the benefit of every part of the building, that portion where the steam heat was generated was on the north half. If the plant had been in the building at the time of the making of the trust deeds an easement for the enjoyment of the heating plant by anyone who should become owner of the south twenty feet upon foreclosure would have passed although not expressly stated, on the principle that when a party grants a thing he grants everything pertaining to it necessary to its enjoyment. The owner could not create any charge or easement on the north half, after the execution of the trust deeds, to the detriment of the owner of that half, but the natural conclusion would be that the installing of the heating plant subject to the right of the owner of the south half to the beneficial use of the same plant constituted an addition to the security as to the north half, and so far as appears that is true. The owner installed the heating plant, which increased the value of both

parcels and which was necessary for the convenient and comfortable enjoyment of both, in such a way that the portion of the plant designed to generate the steam heat was on the north half, and the advantages and burdens of the arrangement attached to the property. Even more liberal principles ought to be applied in such a case than in case of the implied reservation sustained in *Powers v. Heffernan*, 233 Ill. 597. In our opinion the trust deed includes the easement of the beneficial use of that part of the heating plant located on the north twenty feet, and the owner of said north twenty feet must permit such beneficial use by anyone who may become the owner of the south twenty feet under the trust deed."

No distinction, in principle, exists or can be made in the application of the law of easements, between easement of heat, light and air or of ingress and egress, and the right to the use and enjoyment of the water rights and facilities shown in the case at bar. Nor can it well be said that an easement in the beneficial use and enjoyment of the heating plant in *Foote v. Yarlott*, *supra*, was more open, visible and continuous, and susceptible of being operated, used and enjoyed without the interference of man, than the water facilities, pump and engine are in the case at bar. The aid of man to put them in operation and keep them in repair is equally necessary and essential in both cases. The above cases so conclusively answer appellee's contentions upon this question as to render a further discussion of them at this time wholly unnecessary.

As to the rights conferred, if any, by the supposed contract between appellee and Tracy, appellee insists that it never became a binding contract for the reason that it was never fully executed by the parties, as it was never signed by Tracy, and there is no allegation in the bill that after it was signed by appellee it was delivered to and accepted by Tracy or acted upon by him as a binding contract. If it was never executed by the parties or acted upon by them

it would not constitute a binding contract and no rights were conferred by it. It appears that upon the same day the contract was signed by appellee he executed a warranty deed conveying all of the lands mentioned in the contract to said Tracy, and if it ever did become a binding contract it was fully executed on the same day it was made, in so far as the conveyance of the land therein described and agreed to be conveyed was concerned. Just what part this contract was intended to play, if any, in the transaction consummated that day is not made clear by anything contained in the record, and in view of appellee's insistence that it never became a binding contract and its incomplete and only partial execution, which tends very strongly to support his contention, we feel we ought not at this time to attempt to determine its effect upon the rights of the parties in the transaction had on that day. We are unable to perceive why the contract was drawn at all and signed by appellee unless there was a definite purpose on his part to place something in existence from which a prospective purchaser of the property might be led (or misled) into believing, without carefully investigating the legal force and effect of such writing, that the right to use the water went with the property mentioned in the contract. The contract does, however, at least show, wholly irrespective of the question as to whether or not it ever became a binding obligation, that appellee fully recognized the burden imposed by him upon his adjoining lands by reason of the water facilities he had installed for the purpose of supplying the property now owned by appellant with water for domestic and other uses, and would seem to have been intended to enable him to relieve his adjoining property of the burden of this easement just as soon as adequate water facilities should be afforded by the installation of water mains in Deerpath avenue by the public authorities. But however that may be, the only question before us for determination at this time is the sufficiency of the allegations of the bill

to entitle appellant to the relief prayed. As we are clearly of the opinion that the allegations of the bill are sufficient in this respect, the decree of the circuit court of Lake county must be reversed and the cause remanded.

For the reasons given, the decree will be reversed and the cause remanded to the circuit court of Lake county, with directions to overrule the demurrer, and for further proceedings in accordance with the views herein expressed.

*Reversed and remanded, with directions.*

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JANE JONES, Defendant in Error, *vs.* THE SANITARY DISTRICT OF CHICAGO, Plaintiff in Error.

*Opinion filed October 16, 1914.*

1. SANITARY DISTRICTS—*liability of Sanitary District of Chicago does not depend upon wrongful purpose or negligent conduct.* Under the statute the liability of the Sanitary District of Chicago for all damages that may result to any land owner by reason of turning the water from said district into the Illinois river does not depend upon any wrongful purpose or negligent conduct on the part of the district.

2. PLEADING—*when words "wrongful and negligent" are surplusage.* In an action against the Sanitary District of Chicago by a land owner to recover, under the statute, for damages to her land from overflow, the words "wrongful and negligent," used in certain counts of the declaration as characterizing the acts of the district, are surplusage, and do not affect the sufficiency of the counts nor require proof of wrongful and negligent acts in order to prevent a variance.

3. APPEALS AND ERRORS—*when judgment will not be reversed because of defective or unproved counts.* If there be one good count in the declaration and sufficient proof to support it, the Supreme Court will not reverse the judgment merely because there are other counts in the declaration which are either defective or unsupported by proof.

4. SAME—*when a party cannot complain of error in admitting evidence.* A party cannot, on appeal, complain of an error in admitting evidence which has been committed against him where it appears that a like error has been committed in his favor.

5. SAME—*rule as to reversal due to amount of damages.* A judgment in an action for damages to land will not be reversed by the Supreme Court because of the amount of damages awarded by the jury unless the verdict is so high or so low as to indicate the jury must have been influenced by prejudice, passion or favor.

6. INSTRUCTIONS—*when refusal of instruction is not reversible error.* In an action for damages to land from overflow it is not reversible error to refuse an instruction containing the correct legal proposition that the defendant is not liable for damages if the overflow was not caused by some act or omission on its part but was due to other causes with which defendant had no connection, where there are other instructions given which embody substantially the same proposition.

WRIT OF ERROR to the Circuit Court of Woodford county; the Hon. T. M. HARRIS, Judge, presiding.

EDMUND D. ADCOCK, and FRANK J. QUINN, (WALTER E. BEEBE, and SHELTON F. MCGRATH, of counsel,) for plaintiff in error.

BARNES & MAGOON, (THOMAS KENNEDY, of counsel,) for defendant in error.

Mr. JUSTICE VICKERS delivered the opinion of the court :

This is a writ of error directed to the circuit court of Woodford county. By it a judgment for \$5480.50 against the Sanitary District of Chicago is brought up for review.

By her declaration defendant in error alleged that the sanitary district had damaged her farm by inundating it with the waters from the sanitary district channel. The declaration originally consisted of twelve counts. All of the counts were withdrawn except the first, second, fourth, fifth and eighth. At the close of all the evidence plaintiff in error made a motion to direct a verdict of not guilty as to each of the remaining counts, and this motion was overruled. An exception to this ruling was preserved, and it is urged that the court erred in refusing to direct a verdict of not guilty. The specific grounds relied upon in



support of this assignment of error are, that certain material allegations of each count were not proven, and that there is a variance between the several counts of the declaration and the evidence relied upon to sustain them. In some of the counts upon which the case went to the jury it was alleged that plaintiff in error "wrongfully, unjustly and negligently obstructed, raised and elevated, or caused to be obstructed, raised and elevated, the waters of the Illinois river, and wrongfully and unjustly and negligently turned into, and caused to be turned into, said Illinois river, through the Desplaines river," large quantities of water which in a state of nature would not have come there, and that thereby the waters of the Illinois river were caused to back out upon the lands of defendant in error, etc. It is urged that in order to sustain counts containing the words above quoted it was necessary to prove that the acts of plaintiff in error causing the damage were wrongfully and negligently performed. It is contended that since all of the actions of the sanitary district were had under a valid statute its action could not be wrongful, and that there is no proof that there was any negligence, either in the construction or operation of the sanitary district channel. This contention cannot be sustained. Defendant in error bases her right to recover upon the statute under which plaintiff in error was organized. The statute creates liability against the district for all damages that may result to any land owner by reason of turning the water from said district into the Illinois river. The liability does not depend upon any wrongful purpose or negligent conduct on the part of plaintiff in error. The allegation that the action of plaintiff in error was wrongful and negligent is surplusage. The substance of the charge in each count of the declaration is, that plaintiff in error turned a large quantity of water from Lake Michigan into the artificial channel constructed by the sanitary district and caused the same to flow into the Illinois river, thereby causing the waters of the Illinois river

to overflow, submerge and render wet and useless the lands of the defendant in error. Each of the counts stated a good cause of action, in substance, under the statute, and the introduction of the immaterial and unnecessary words, "wrongful and negligent," did not affect the sufficiency of the counts, nor did a failure to prove that the acts of plaintiff in error were wrongfully and negligently performed constitute a variance. In further answer to this alleged error it may be said that this objection does not apply to all of the counts of the declaration. Defendant in error was within the rules of good pleading in stating the cause of action in different language in the several counts of her declaration, and she was not bound to prove each count of the declaration in order to entitle her to a verdict. If there be one good count in the declaration and sufficient proof to support it, this court would not reverse the judgment merely because there were other counts in the declaration which were either defective or unsupported by proof. (*Scott v. Parlin & Orendorff Co.* 245 Ill. 460; *Grannon v. Donk Bros. Coal Co.* 259 id. 350; *Humason v. Michigan Central Railroad Co.* 259 id. 462.) There was no error in refusing to direct the verdict of not guilty.

Plaintiff in error next contends that the court erred in admitting proof of a difference in the condition of farm lands in the Illinois river bottom before and after the water was turned into the Illinois river from the sanitary district. Evidence was received, over objection of plaintiff in error, that the tendency had been to increase the overflows from the Illinois river since 1900, and that lands which before that time were above high-water mark were inundated and damaged; also, proof was received that the creeks tributary to the Illinois river had filled up at the mouths with sand, rubbish and silt as a result of the dead water from the Illinois river backing up into the creeks for a greater distance than before the waters of the sanitary district were turned in. As a result of the filling up of the creeks near

the river the head waters flowing down the creeks were obstructed and dammed up and were thus backed up and spread out over adjacent lands. This condition was shown to exist in regard to a creek which ran through the lands involved in this suit, and the evidence objected to tended to show that the same condition existed in other creeks which flow into the Illinois river below the mouth of the sanitary district channel.

Plaintiff in error insists that it was error to receive evidence in regard to the effect of turning the waters of the sanitary district into the Illinois river upon any lands other than those of defendant in error. Plaintiff in error sought to account for the higher stages of the Illinois river by reason of the organization of drainage districts in the Illinois river bottom and the construction of levees both above and below the lands of defendant in error, and in attempting to establish its contention in this regard plaintiff in error saw proper to extend the scope of inquiry over the entire length of the Illinois river and some of its tributaries in the State of Illinois. Numerous witnesses were introduced to describe the nature and extent of the local improvements made by different drainage districts and numerous photographs were introduced showing various conditions that had been found to exist at different places on the Illinois river. Having thus gone into a general inquiry in regard to conditions that have been found to exist at numerous points up and down the Illinois river, plaintiff in error is in no position to complain that defendant in error was also permitted to introduce evidence of a similar character tending to show the general condition as it existed before and after the turning in of the sanitary district water, of the lands in the Illinois river valley. A party cannot complain of an error committed against him when a like error appears to have been committed in his favor. *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9; *Chicago, Burlington and Quincy Railroad Co. v. Murowski*, 179 id. 77;

*Kuhn v. Eppstein*, 239 id. 555; *Wetzel v. Firebaugh*, 251 id. 190.

Plaintiff in error complains that the damages are excessive, and that the verdict is, in its amount, against the clear weight of the evidence. The testimony upon the question of damages is quite voluminous. The abstract contains about 450 pages and is largely made up of the testimony given on both sides upon the question of damages. As is usually the case in the trial of an issue of this character, the witnesses differ widely both in regard to the value of the land prior to 1900 and subsequent to that date. Counsel upon both sides have devoted much space in their respective briefs to a discussion of the evidence bearing upon the question of damages. We have carefully considered that question in the light of the evidence and the discussion in the briefs and have reached the conclusion that the verdict is not excessive. The testimony of many of the witnesses would have warranted a much larger amount, but, taking the evidence altogether, we are inclined to the opinion that the verdict is in accord with its fair weight. The rule that applies to questions of this kind is, that this court will not reverse a judgment solely because we may differ from the jury in our opinion as to the proper amount of damages. It is only in cases where the verdict is so high or so low as to indicate that the jury must have been influenced by some prejudice, passion or favor that this court will reverse the judgment because of the amount of damages. *City of Joliet v. Weston*, 123 Ill. 641; *Harney v. Sanitary District*, 260 id. 54.

Plaintiff in error offered, and the court refused to give, the following instruction:

"You are instructed that the defendant is liable in damages only for the lessening, if any, in the fair cash market value of the land described in the plaintiff's declaration as such value existed just before January 17, 1900, before the water of the defendant was turned into the Illinois river,

due to causes for which said defendant is responsible, and if you find, from the greater weight of the evidence, that the channel through which the waters of the Illinois river flow has been reduced in size below the land of the plaintiff by artificial means since January 17, 1900, by acts other than those of the defendant, and that such reduction in the capacity of the said channel of the Illinois river has retarded the flow of said river and caused the water of said river to flow upon and remain longer upon the lands of the plaintiff in the spring and summer months than would have occurred had it not been for such restriction in capacity of said channel, then, as to any depreciation in the fair cash market value of such lands resulting from such restriction, if any such you find from the greater weight of the evidence, you will find the defendant not guilty."

The action of the court in refusing to give this instruction is relied on as reversible error. As has already been stated, plaintiff in error sought to relieve itself from responsibility by contending that the increase in the water level of the Illinois river was due wholly or in part to works of reclamation made by drainage districts, and witnesses were introduced who testified that the effect of building levees below the land in controversy would tend to confine the waters within the bed of the river and cause a higher stage of water than had ever been known before such levees were constructed. The instruction complained of, while it may be open to some criticism in substance, states a correct legal proposition. The rule which is stated in the instruction, that no one is liable for injuries to another which are not proximately due to some act or omission of the party charged, is too well known to require either argument or authorities to support it. But we are of the opinion that the refusal of this instruction is not reversible error in view of other instructions which were given. By the second instruction given for plaintiff in error the jury are informed that defendant in error cannot

recover for any speculative damages, and that before she can recover at all she must establish, by a preponderance of the evidence, "that she has been damaged by causes under the control of the defendant," as charged in her declaration. Again, in the fourth instruction the jury are advised that the defendant in error can only recover "by reason of the acts of the defendant or from causes under its control." The fifth, sixth, seventh, eighth, fifteenth and sixteenth instructions given on behalf of plaintiff in error all contain language which limit the jury to the assessment of damages for acts of plaintiff in error alone. In view of the numerous instructions given in which the jury were directed only to assess damages for the acts of plaintiff in error, we cannot see how it is possible that any injury resulted from the refusal of the court to re-announce the same principle in another instruction.

Plaintiff in error complains of numerous rulings of the court in the admission and exclusion of testimony bearing upon the amount of damages to be assessed. These complaints, in the main, relate to the basis upon which the different witnesses estimated the amount of depreciation in the lands in controversy. We find no substantial or prejudicial error in the rulings of the court in this regard. This suit was commenced in 1905. It has been pending and undetermined since that time. The record was filed in this court in March of this year. The delay in getting the case to a final judgment in the trial court is certainly very extraordinary and unreasonable.

Finding no substantial error in this record the judgment of the circuit court of Woodford county is affirmed.

*Judgment affirmed.*

THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY,  
Appellant, v.s. WILLIAM L. O'CONNELL, County Col-  
lector, Appellee.

*Opinion filed October 16, 1914.*

**TAXES**—*State Board of Equalization cannot make an arbitrary assessment of capital stock.* The State Board of Equalization has no right arbitrarily to assess the capital stock of a corporation in disregard of its own rules for assessing the capital stock of all corporations and without reference to the requirements of such rules or any attempt to ascertain the actual value of such capital stock by any of the methods open to it.

APPEAL from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding.

PRINGLE & FEARING, and BENTLEY, BURLING & SWAN,  
for appellant.

MACLAY HOYNE, State's Attorney, (CHARLES CENTER CASE, JR., and WILLIAM H. DUVAL, of counsel,) for ap-  
pellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The State Board of Equalization assessed the fair cash value of the capital stock of the appellant, the Calumet and Chicago Canal and Dock Company, over and above the assessed value of its tangible property, for the year 1908 at \$100,000, for 1909 at \$105,000, for each of the years 1910, 1911 and 1912 at \$150,000, and for 1913 at \$45,000. Each year the appellant filed a bill to enjoin the collection of taxes on the assessment, and the bill in this case was filed in the superior court of Cook county to enjoin all the taxes, pursuant to an agreement for the dismissal of the former suits and the uniting of the objections to all the assessments in one bill. The court having sustained a demurrer, dismissed the bill for want of equity, and the complainant appealed.

It is averred in the bill that the appellant was organized for the purpose of maintaining docks, slips, canals, etc., and acquired a large amount of unimproved land near Lake Calumet, in Chicago, the greater part of which has not been salable owing to lack of drainage, and the sole business of the appellant for many years has been caring for and attempting to dispose of this vacant real estate. In each of the years from 1908 to 1913, inclusive, its tangible property was assessed and the assessment confirmed by the board of review of Cook county, the amount varying from \$3,039,-846 in 1908 to \$2,036,092 in 1913. In each of these years the appellant filed with the board of assessors a schedule, as required by section 32 of the Revenue law, and mailed a copy to the State Board of Equalization. The rules of the State Board of Equalization for the assessment of the fair cash value of the capital stock of corporations in excess of the equalized valuation of their tangible property provide, in substance, that the fair cash value of the shares of capital stock and the amount of the indebtedness of the corporation, except indebtedness for current expenses, shall be added together and the aggregate amount shall be equalized with other property throughout the State, and from the aggregate amount so equalized shall be deducted the aggregate equalized valuation of all tangible property of the corporation, and one-third (in 1908 one-fifth) of the remainder shall be the assessed value of the capital stock of the corporation over and above its tangible property. At no time during the years in question did the appellant have any indebtedness except for current expenses, and at no time did its indebtedness, except for taxes, exceed \$2000. During all these years the appellant's shares of stock were listed on the Chicago Stock Exchange, an association organized for the purpose of affording a market for the purchase and sale of shares of stock and other securities, particularly those of corporations located in Chicago and its vicinity. This exchange has been the regular market where the ap-



pellant's shares have been bought and sold, and there has been no other market for them and they have not been listed or traded in on any other exchange or market. They have been regularly bought and sold on the Chicago Stock Exchange throughout the years in question and during the preceding ten years, and at no time has there been any speculation in the shares of stock of the appellant, and the record of sales on the stock exchange has not been in any way fictitious but has at all times represented the fair cash value of the shares. During the years in question and the ten preceding years the fair cash value of said shares, as fixed by actual sales on the stock exchange, has varied from \$40 per share to \$82.50 per share, and no share has ever sold at private sale or in any market or exchange for a greater price, and at no time has the actual value of the shares exceeded \$82.50. The bill sets out the number of shares sold on the Chicago Stock Exchange from 1898 to 1913, inclusive, together with the highest, lowest and average price in each year, and makes a comparison with the value of the tangible property of the appellant as assessed, showing that the tangible property assessment exceeded the value of all the shares of capital stock of the appellant, taken at its highest price during each year, from \$216,477 to \$1,127,113. In 1908 the State Board of Equalization added to the tangible property assessment \$100,000 as a capital stock assessment, in 1909 \$105,000, in 1910, 1911 and 1912, each year, \$150,000, and in 1913 \$45,000. The State Board of Equalization made no investigation of the facts in regard to the value of the stock and had no information or facts before it except those stated in the bill and shown by the appellant's schedules, and there were no other facts and no other information as to the value of the stock to be obtained or in existence. The board made no attempt to ascertain the facts and disregarded its rules as to determining the fair cash value of the capital stock, and, in disregard of the real value of the capital stock, arbitrarily fixed the valua-

tion of the capital stock at a lump sum for the purpose of producing the result which was produced and not in the exercise of honest judgment.

It is apparent from the foregoing statement of the averments of the bill, which are admitted by the demurrer, that in accordance with the rules of the board for the assessment of the capital stock of all corporations there could be no assessment of the capital stock of the appellant in excess of the equalized valuation of its tangible property. The facts in regard to the valuation of the tangible property of the corporation, the amount of its indebtedness and the market value of its stock are averred, and it is admitted that in no year did the value of its stock exceed the valuation of its tangible property, and there was no indebtedness of the corporation which, under the rules, could be added to this value. There was therefore no basis for an assessment of capital stock in excess of the valuation of the tangible property. The appellant was engaged in no business except caring for and attempting to dispose of this property. In fixing the fair cash value of the shares of capital stock the rules authorized the board to take into consideration, among other things, not only the value of the shares of stock and the quotation of such shares in the market, but also the books of the corporation, the returns made to the Auditor of Public Accounts, and such other information as the board might have or be able to obtain. The assessment is contrary to the market value. The board made no inquiry of the appellant in regard to the value of the stock and no examination of its books, and the returns made to the Auditor in the years in question, all of which were attached as exhibits to the bill, furnished no basis for an assessment of the capital stock in excess of the valuation of tangible property. In regard to any other information which the board had or might be able to obtain, it is averred that the board had no such information and made no effort to obtain any, and that, in fact, there were no other

facts or information in existence or to be obtained as to the value of the stock, but that the board in each year arbitrarily added a fixed amount to the assessment of tangible property as a capital stock assessment.

The rules fixed by the State Board of Equalization for ascertaining the value of the capital stock of corporations have been approved by this court. In *State Board of Equalization v. People*, 191 Ill. 528, an assessment which had been arbitrarily made too low was disregarded and the State Board of Equalization was required to make an assessment of the capital stock of the corporations involved there in accordance with the rules of the board substantially the same as those now in force, and in *Chicago, Burlington and Quincy Railroad Co. v. Cole*, 75 Ill. 591, the collection of taxes upon an excessive assessment made in violation of the rules was enjoined, the court saying that the decision of the court sustaining the rules implied that they should be adhered to and faithfully applied in the assessments to which they were applicable.

The courts have no authority to supervise the valuation of property by the officers to whom its valuation for taxation has been committed by law, where such officers, acting within the scope of their powers, have made an assessment by the honest exercise of their judgment according to the law. But the State Board of Equalization has no right, in disregard of its own rules established for the assessment of the capital stock of all corporations, arbitrarily to assess the capital stock of one corporation by an exercise, not of its judgment but of its will, without reference to the requirements of those rules. According to the averments of the bill that is what was done in this case, and the demurrer should have been overruled.

The decree will be reversed and the cause remanded to the superior court, with directions to overrule the demurrer.

*Reversed and remanded, with directions.*

S. H. CUMMINS, Appellant, *vs.* MARGARET J. DRAKE *et al.*  
Appellees.

*Opinion filed October 16, 1914.*

**PARTITION**—*mere existence of life estate does not prevent partition.* The mere existence of a life estate in the whole premises does not prevent partition among the remainder-men prior to the death of the life tenant, as the remainder, if not divisible, may be sold without the life estate and the proceeds divided, or, if the life tenant consents, the whole estate may be sold. (*Dee v. Dee*, 212 Ill. 338, distinguished.)

APPEAL from the Circuit Court of Macon county; the  
Hon. W. C. JOHNS, Judge, presiding.

BUCKINGHAM & McDAVID, (S. H. CUMMINS, *pro se*,)  
for appellant.

B. F. SHIPLEY, and REDMON & HOGAN, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

S. H. Cummins, the appellant, filed his bill in the circuit court of Macon county to partition forty acres of land. Margaret J. Drake and other heirs-at-law of John W. Drake, deceased, (the appellees,) were made defendants and interposed a demurrer to the bill. The demurrer was sustained and the bill dismissed, and this appeal has been prosecuted from that decree.

The title to the land involved was derived through Nicholas Drake, who died testate. The first clause of his will is as follows: "I give and bequeath to my wife, Margaret J. Drake, the use of all my real estate during her natural life or as long as she remains my widow, and at her death or re-marriage the real estate to be divided as follows ~~between~~ my heirs, as follows:" By the second clause ~~he devised~~ his real estate to his three children, subject to the life estate of his wife, giving to each specific tracts, accurately described. To his son John he devised

the forty acres in question. On February 12, 1904, John died intestate, leaving no children or descendants of children, but leaving Alice Drake, his widow, Margaret J. Drake, his mother, Mary, his sister, and two nieces, as his only heirs-at-law surviving him. Alice Drake thereafter conveyed her interest in the forty acres involved to appellant, who thereupon brought this suit to partition the land, subject to the life estate of Margaret J. Drake.

The contention of appellees is, that the will of Nicholas Drake imposed such conditions or restrictions on the various devisees in the will as to prevent the devisees, their heirs or assigns, from demanding partition of any portion of the estate. In support of this contention they rely principally upon *Dee v. Dee*, 212 Ill. 338. The situation presented by the will of Nicholas Drake is in no respect similar to that involved in the *Dee* case. By the will here involved Margaret J. Drake was given a life estate in all of the real estate of the testator and the remainder was specifically devised to his various children, the possession only being postponed until the death or re-marriage of Margaret J. Drake. Appellees concede in their argument that "there is no doubt but the remainder vested at once upon the death of the testator, but the right of enjoyment was deferred until the death or re-marriage of the widow." John W. Drake became vested, immediately upon the death of his father, with the remainder in the forty acres devised to him, subject only to the life estate of his mother, and he had the right to sell it or dispose of it in any manner he chose. Upon his death his wife, under the statute, inherited an undivided one-half of that remainder and had the same right to dispose of it as her husband had in his lifetime. Appellant being the remainder-man of an undivided interest in this property is entitled to maintain a suit for partition against the owners of the remaining undivided interests in remainder, and this is true although the whole premises are subject to a life estate which is unexpired.

(*Scorille v. Hilliard*, 48 Ill. 453; *Drake v. Merkle*, 153 Ill. 318.) Partition among remainder-men does not necessarily affect the estate of a life tenant, as the remainder, if not divisible, may be sold without the life estate and the proceeds divided, or, if the life tenant consents, the whole estate may be sold. (*Drake v. Merkle, supra.*) Appellant's right to partition is imperative and the court erred in sustaining the demurrer to the bill.

The decree of the circuit court is reversed and the cause remanded.

*Reversed and remanded.*

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THE HIGHWAY COMMISSIONERS OF THE TOWN OF ROSS,  
Appellees, vs. J. B. CHAMBERS *et al.* Appellants.

*Opinion filed October 16, 1914.*

1. PARTIES—when executor is not a necessary party to a proceeding to assess damages for highway. An executor need not be made a party, in his representative capacity, to a proceeding by highway commissioners to assess damages for opening a highway over a farm, where the will vests the title to the farm in the devisees and does not, either expressly or by implication, vest any title in the executor.

2. EMINENT DOMAIN—condemner cannot prove release of easement by third party over defendant's land. In a proceeding by highway commissioners to assess damages for land taken for a public highway, the commissioners are not entitled to prove, in reduction of the defendant's damages, that a third party who has an easement of way over the defendant's land proposes to release his easement upon condition that the highway be opened.

APPEAL from the Circuit Court of Vermilion county;  
the Hon. E. R. E. KIMBROUGH, Judge, presiding.

I. A. LOVE, for appellants.

GEORGE A. RAY, and DYER & DYER, for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

The highway commissioners of the town of Ross, in Vermilion county, commenced suit before a justice of the peace for the purpose of having damages assessed for lands taken for a highway. The proceeding was commenced against John Chambers, Melissa Allen, Sarah J. Leonard, Malinda Bridges and Richard Chambers, as the owners of the land sought to be condemned. The defendants appeared and filed a claim setting up that they were the owners, as tenants in common, of a farm of 320 acres, a part of which was sought to be condemned for the highway in question, and claiming damages to the remainder of the farm not taken. A trial was had before a jury in the justice court, which resulted in an assessment of \$825 damages. The defendants prosecuted an appeal to the circuit court, where the case was again tried, resulting in a verdict assessing the damages at \$800. After overruling a motion for a new trial a judgment was entered upon the verdict, to reverse which the defendants below have prosecuted an appeal to this court.

Appellants obtained their title to the 320 acres of land as devisees under the last will of William G. Chambers, deceased. The will of William G. Chambers was introduced in evidence, from which it appears that appellant John B. Chambers was appointed executor. The will directs the executor to lease or rent the farm in question for cash rent and to pay the taxes and repairs, and out of the balance remaining to pay the widow \$400 yearly, and to divide the residue equally among the five children of the testator, who are the appellants in this case. The will provides that after the death of the wife all the property of every kind, both real and personal, except household goods, shall be divided equally among the five appellants herein. John B. Chambers, as executor, was not made a party to the proceeding before the justice of the peace.

After the cause was removed to the circuit court by appeal, appellees obtained leave of court and caused the summons and return to be so amended as to show that John B. Chambers, individually and as executor of the last will of William G. Chambers, was a party defendant. No other summons was issued or served upon John B. Chambers as executor, and he was only brought into the case as executor in the manner above stated. The constable who served the summons signed the return, to which an affidavit was attached showing that service had been had upon John B. Chambers individually and as executor. A motion was made by John B. Chambers, as executor, to quash the summons and service as to him as executor, which was overruled and the case proceeded thereafter to final judgment. The judgment of the court directed the payment of the damages to John B. Chambers as executor, for the use of himself and his co-appellants, and directed the payment of \$160 to each.

Appellants insist that the court erred in taking jurisdiction of John B. Chambers as executor. If John B. Chambers, in his capacity as executor, was a necessary party to this proceeding the question raised would require serious consideration, but we are of the opinion that he was not, in his representative capacity, a necessary party. The will does not, by express language or necessary implication, give him any title to the real estate. He is merely directed to rent it during the lifetime of the widow, pay the taxes, keep up the repairs and pay the widow \$400 per year, and distribute the balance, if any, to the five children of the testator. At the death of the widow the property is to be equally divided among the five children. The will vests the whole title in the five devisees, subject to an annuity of \$400 to the widow, which the executor is directed to pay out of the rents of the land. Nowhere does the will purport to devise the land to the executor, and the execution of the powers conferred upon him does not require



that he should have any title to the land. He therefore had no interest, as executor, to be condemned and was entitled to no damages in his capacity as executor. The rule in this class of cases is, that all persons having any interest in the property which will be affected by the proceedings are entitled to be heard and should be made parties; and, conversely, it is not necessary or proper to bring in persons who have no interest or whose interests are of such a character that they will not be affected by the proceedings. (15 Cyc. 837; *Allen v. City of Chicago*, 176 Ill. 113.) John B. Chambers, as executor, had no interest requiring that he be made a party in his representative capacity. In condemning lands constituting the estate of a deceased person the proceeding is properly brought against the heirs unless there be a statute requiring the executor or administrator to be made a party defendant. (15 Cyc. 839, and cases cited.) John B. Chambers, as executor, being an unnecessary party, it is immaterial how he was brought into the case or whether he was brought in at all.

On the trial of the case in the circuit court appellees called Samuel Collison as a witness, and he testified that he was a banker, residing in Rossville, and that he also was engaged to some extent in farming. He testified that he owned about 60 acres of land adjoining the proposed highway. He pointed out on a map the location of the proposed highway and its location with reference to his land. After having given evidence of these preliminary matters an objection was interposed that it was not competent or material to show the location of the Collison land. Thereupon the trial judge remarked that he did not know what the purpose of counsel was. In answer to the suggestion of the court, Mr. Dyer, counsel for appellees, stated that the purpose was to show that he (Collison) had an easement across appellants' land, and stated that it was his purpose to introduce in evidence a surrender or release of that easement if the proposed highway be opened. Counsel for ap-

pellants objected, and the court asked whether the easement was along the line of the proposed road, and it was stated by appellees' counsel that it was not,—that the easement was south of the proposed road. Counsel for appellees then stated that he had a release, duly executed by Collison under seal, of the easement, which he would introduce in evidence, and stated that "if the highway is opened then it is released forever." Objection was then made, both to the statement of counsel as being prejudicial and also to the release as immaterial. The court held that appellees were entitled to show that Collison proposed to release his easement over appellants' land in mitigation of damages to land not taken, and this ruling was excepted to. Appellees' counsel then proceeded to show the existence of the easement, and counsel for appellants admitted that there was an easement over appellants' land from the Collison land to a highway which was appurtenant to the Collison estate. The written release of the Collison easement was not thereafter formally offered in evidence and it does not appear in the record, but it is clear from what occurred that appellees had the benefit before the jury of whatever reduction of damages the jury might allow by reason of the proposed release of the Collison easement.

Appellants insist that it was error to introduce any evidence in respect to the Collison easement, or its proposed release, for the purpose of affecting the damages to be assessed to appellants. In proceedings under the Eminent Domain statute the condemnor may stipulate of record that he will perform a particular specified work, such as building bridges, removing and replacing buildings, fences and the like, or that he will only use the condemned property in a particular manner, and these stipulations will be binding and enforceable and may be considered by the jury in arriving at the amount of damages to be assessed, but this rule cannot be extended so as to give the condemnor the benefit of a release of an easement by a third party. The

Collison easement, we infer from the meager showing of the record on that subject, was a right of way from the Collison land across appellants' land to a highway. Collison had no right or title to such an easement which he could sell or transfer separate and apart from his land. Manifestly it was a mere appurtenance to the 60 acres which he owned adjoining the Chambers farm. True, he could release it to the owner of the land upon which it was a burden but could not transfer it to the road district, directly or indirectly, nor could he donate it, in connection with this condemnation proceeding, to the public and thereby reduce the damages appellants were justly entitled to. If, after the highway in question shall be opened, Collison finds it more convenient to use the public highway than his private way he can abandon the private way, and it will then revert to appellants, who own the fee of the land burdened with the easement.

While we do not care to discuss the evidence bearing upon the amount of damages, we have carefully considered the same and are impressed that the award is considerably under the amount that the evidence would have justified.

It is not necessary for us to determine whether, if the record were otherwise free from error, the judgment would be reversed because the damages are inadequate, but in view of the error which we have pointed out in respect to the Collison easement we are constrained to believe that that error must have influenced the jury in fixing the just compensation. In our opinion appellants are entitled to have their compensation assessed by a jury uninfluenced by any consideration of the value to them of having the Collison easement released.

The judgment of the circuit court of Vermilion county is reversed and the cause remanded.

*Reversed and remanded.*

THE CITY OF PANA, Appellee, vs. WILLIAM M. BALDWIN  
et al. Appellants.

*Opinion filed October 16, 1914.*

1. SPECIAL ASSESSMENTS—*when objection that ordinance does not fix grade for "returns" and "approaches" is not good.* An objection that the ordinance does not sufficiently fix the grade of "returns" and "approaches" is not valid, where it is plain from the ordinance that they are merely the extensions at street intersections to the street lines and they are sufficiently described and provided for in the ordinance and the plans and profiles made a part of the ordinance.

2. SAME—*when a verdict as to benefits will not be disturbed.* The verdict of the jury as to benefits in a special assessment case, which verdict has been approved by the trial court, will not be disturbed on appeal as being against the weight of the evidence, where the evidence is conflicting and the correctness of the verdict depends merely upon the question of the weight and credit to be given to the testimony by the jury.

APPEAL from the County Court of Christian county;  
the Hon. C. A. PRATER, Judge, presiding.

JOHN E. HOGAN, and E. E. DOWELL, for appellants.

GEORGE T. WALLACE, and R. J. MONROE, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Christian county confirming a special assessment for a local improvement in the city of Pana. The special assessment was levied to pay the cost of paving parts of three streets with brick, at an estimated cost of \$47,000. The improvement is in a residence part of the city and the property assessed belonged to a large number of persons, fifty-two of whom filed objections to the confirmation. All legal objections were overruled and no error is assigned upon that branch of the proceeding, except it is claimed the ordinance is void as being unreasonable and oppressive,

and also that it was defective in several respects. A trial by jury was had upon objections to benefits. The jury found the property would be specially benefited by the improvement to the amount of its cost. A motion by the objectors for a new trial was overruled by the court and a judgment rendered confirming the assessment as made. Certain of the objectors have prosecuted this appeal from that judgment.

The objections made to the ordinance are, that it "does not sufficiently describe the nature, character, locality and description of the proposed improvement," and does not sufficiently describe the cement to be used in the improvement nor fix any standard for the test of the cement. The ordinance requires the paving of certain "returns" and "approaches," and it is contended it fails to fix their number or location or establish any grade therefor; that it requires that at all street and alley intersections the paving and curbing shall be carried back to the street lines but does not establish a grade for the work; also it is contended it does not sufficiently describe an inlet required. We have examined the ordinance and are of opinion it is not open to any of the objections made. It sufficiently describes every detail of the improvement. It is not claimed that the ordinance does not sufficiently fix the grade of all parts of the improvement other than the "returns" and "approaches." It is plain from the ordinance these are the extensions at street and alley intersections to the street lines, and they are sufficiently described and provided for in the ordinance and the plans and profiles which are made part of the ordinance. *Hutt v. City of Chicago*, 132 Ill. 352; *Louisville and Nashville Railroad Co. v. City of East St. Louis*, 134 id. 656; *City of Hillsboro v. Grassel*, 249 id. 190.

The ground mainly relied upon for a reversal of the judgment is, that the finding that the property of the objectors would be benefited to the amount it was assessed for the improvement is contrary to the evidence. It was

agreed at the commencement of the hearing upon the question of benefits that the witnesses on each side should be limited to ten and that each objector testifying for himself or herself should be counted as one witness. Appellants called nine witnesses who testified as to the effect of the proposed improvement upon all of the property of the objectors, and about forty of the fifty-two objectors testified as to the effect of the improvement upon the value of their respective properties. Of the nine witnesses who testified as to the effect of the improvement upon the value of all the property assessed, most of them were objectors. Some of the objectors' witnesses testified their property would not be benefited in value by the improvement, but most of them testified the property in the district would be increased in value to some extent. The majority of those who named an amount the property would be increased in value fixed the increase at about one-half the cost of the improvement. Of the ten witnesses called by appellee, nine of them, as we understand, were not owners of property assessed, but most of them were property owners in other parts of the city and some of them owned property abutting streets that had been paved by special assessment. One of appellee's witnesses owned property in the district assessed for the proposed improvement, and his property was assessed about \$900. The testimony of the ten witnesses was that the property assessed for the improvement would be benefited in value to the amount of the assessment. There is nothing in the record indicating that the witnesses for appellee were not as competent to testify upon the question as those of appellants nor that they were not as credible and worthy of belief. If their testimony was regarded as more satisfactory by the court and jury than the testimony of appellants' witnesses, then the verdict and judgment were warranted. If they had regarded the testimony of appellants' witnesses as more satisfactory than that of appellee's witnesses, the verdict and judgment should, and no doubt would, have been

the other way. It was in the first instance peculiarly the province of the jury to determine the weight and credit to be given to the testimony, and in the state of the evidence, after the finding has been approved by the trial court, it cannot be disturbed by a reviewing court on the ground that it is contrary to and not sustained by the evidence. And this would be just as true if the verdict and judgment had been in favor of appellants.

Complaint is made of a number of instructions given for appellee, but we are of opinion there was no substantial error committed in the giving of instructions. It is true there were some unnecessary repetitions of some propositions, but they were not such as would justify a reversal of the judgment.

The judgment of the county court is affirmed.

*Judgment affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, *vs.* JOHN PETERS, Plaintiff in Error.

*Opinion filed October 16, 1914.*

1. **BRIBERY**—*at common law, bribery and attempt to bribe were punished in the same way.* At common law, bribery was a misdemeanor and the distinction between bribery and attempt to bribe was of little practical importance, as the offer to bribe, although there was no acceptance or delivery of the gift or reward, was indictable and punishable in the same way as though there had been delivery and acceptance.

2. **SAME**—*in Illinois both parties must have acted corruptly to constitute bribery.* Under section 31 of the Criminal Code the offense of bribery requires not only a corrupt motive upon the party offering the bribe but also a corrupt motive on the part of the person accepting the same, and if the officer sought to be bribed merely accepts the money with the intention of bringing the other party to justice the offense is only an attempt to bribe.

3. **SAME**—*effect where State's attorney arranges trap for suspected briber.* The facts that the State's attorney secretes witnesses in his room to overhear a conversation between himself

and a person who he believes is about to offer him a bribe, and that he pretends to accede to such person's overtures and sends a third person into the room to receive the money offered, do not relieve the act of its criminal character as an attempt to bribe.

4. *SAME*—*defendant has a right to testify as to his intent in paying money.* In a prosecution for bribery the question of the defendant's motive, intention or belief in paying over the money is an important element of the offense, and the defendant has a right to testify as to what such motive, intention or belief was.

WRIT OF ERROR to the Circuit Court of St. Clair county;  
the Hon. GEORGE A. CROW, Judge, presiding.

H. E. SCHAUMLIEFFEL, and D. J. SULLIVAN, for plaintiff in error.

P. J. LUCEY, Attorney General, CHARLES WEBB, State's Attorney, and GEORGE P. RAMSEY, (A. B. DAVIS, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error, John Peters, was found guilty of bribery in the circuit court of St. Clair county and sentenced to the penitentiary. He has brought his case to this court on writ of error.

Peters was the proprietor of a saloon in the south-eastern part of St. Clair county. Charles Webb, the State's attorney of that county, accompanied by various officers and others, visited the saloon one evening about October 3, 1913, and caused the arrest of Peters for keeping and operating a slot machine. It was arranged that the machine should be delivered the next morning to a man who would come around with a van collecting a number of slot machines confiscated at the same time in that locality. Peters was instructed to go before a justice of the peace the following morning and give bond for his appearance before the grand jury or take such other course permitted by law as he desired. Accordingly he went before a justice of the peace



on the following day, waived preliminary examination and gave bond. At the time he was arrested for operating the slot machine he said to the State's attorney that he had been a good friend of his and had supported him during his campaign for election and thought the State's attorney ought not to force him to pay a fine for operating the machine. The State's attorney testified that he replied that he could do nothing else. Three or four days later, while the State's attorney and one Curtis A. Betts were on their way to lunch in the city of East St. Louis they met plaintiff in error. According to the State's attorney, Peters said, "Now, Charley, I would like to have this thing kept out of the courts and it ought to be fixed up," and when the State's attorney replied that he did not know how it could be done, Peters said, "Oh! you know and I know how these things are done, and you know you can lose that case." The State's attorney testified that he replied that he did not want to talk to plaintiff in error about it. Betts testified, and so far as he heard the conversation he substantially agreed with Webb's testimony. Peters stated on the stand that he said to Webb, "I would like to square it and get out of it; it troubles my mind, and I have never been in trouble in my life before." The State's attorney testified that later, on October 11, at a restaurant in East St. Louis where he was eating lunch with his assistant, A. B. Davis, Peters, who had taken his lunch at the same place, passed his table and whispered in the State's attorney's ear that he wanted to see him about that matter. The State's attorney testified that he said, "I will be in my office at three o'clock, in the Arcade building," and that Peters said, "I will be there at three o'clock; you know what I want." After Webb left the restaurant he saw Betts and talked over the matter with him. Betts was a newspaper reporter on one of the St. Louis papers and had been for several months doing detective work and looking up evidence for State's attorney Webb. They arranged a plan to have the conversation be-

tween Webb and Peters overheard when the latter came in, in the afternoon. In the back room of the State's attorney's office was a rattan couch covered with bed clothing apparently reaching very near the floor. Webb and Betts called to their assistance Charles P. Webb, a young man twenty-six years old and a nephew of the State's attorney, and one Schenck, of about the same age. The two young men crawled under the couch shortly before Peters was to appear. Betts and a constable were instructed to be in an adjoining room at three o'clock. At that time, according to the State's attorney's testimony, the plaintiff in error came into the office and Webb took him into the back room, where the couch was situated, and they sat down near a table. The State's attorney testified that he asked Peters what he wanted, and the latter replied, "Of course you know what I want; I don't want to be indicted; I don't want to be fined; I am not making a great deal of money down there where I am running this saloon and cannot afford to pay a fine, and I want it fixed up." The State's attorney testified that he replied he did not think he could fix it up; that Peters said, "Well, I brought \$20 that I expected to fix it up with;" that after the State's attorney told him that the smallest amount he could fix it up with was \$135 or \$140 under the law and that it could not be settled out of court, Peters said, "I know it has been done and I know those things are done;" that after some further talk the State's attorney said, "What do you want to do?" and Peters replied, "Well, I want to pay you \$20, and, besides, I am going to buy my brother's saloon, out near Washington Park, \* \* \* and I will be able to run a poker game in that saloon and make from \$20 to \$40 a month; \* \* \* it will be outside of St. Louis and nobody can bother me and I will pay you anywhere from \$25 to \$40 a month, depending on the value of the game;" that the State's attorney then said, "I will not take your \$20 but I will send a man in here and you can talk with him."

Webb then sent Betts into the room where plaintiff in error was. Betts testified that Peters handed him a \$20 bill and that he asked Peters what it was for, and the latter replied, "You know all about this;" that thereupon Betts asked, "Well, is this carrying out the understanding you reached with Webb just now?" and Peters said, "Yes, that is it." Thereupon Peters handed Betts the \$20 bill and asked for a receipt for it, which Betts gave him. Webb and the constable then came into the room and Webb stepped to the couch and lifted it from over the two young men. Webb then ordered the constable to arrest Peters. When the couch was lifted Peters raised his hands and said, "Oh! my God!" and also something to the effect that he thought before that the State's attorney was smart but now he knew it. The two young men testified substantially the same as to what took place in the room as did Webb and Betts.

Peters' account of the transaction was, that when he went to the State's attorney's office Webb first asked him to go to a saloon down-stairs and have a drink; that after they returned they went into a back room and the following took place: "I went in and we sat down at a long table, and he says, 'Do you know what the costs in this case is?' I says, 'I have no idea, Charley,' and he says, 'The costs is \$115,' and I says, 'Gee! That much for the first offense?' and he says, 'Yes, I get \$15 out of that.' I says, 'Is that all you get out of it?' and he says, 'That is all.' And he says, 'How much are you willing to pay?' and I says, 'I don't know, Charley; I won't say; I may say too much or not enough.' And he says, 'You will tell somebody,' and I said, 'No, I won't,' and he says, 'Oh! you will tell somebody,' and I says, 'No, I won't; I won't even tell my wife; I know my business.' And he says, 'How will \$25 do?' I studied awhile and I said I was a poor devil and it was hard to make a living, and I says, 'Now is your time to show leniency for what I done for you,' [when Webb was

a candidate,] and he says, 'All right; \$20 will do.' He says, 'I will not take it myself; I will send a man in and he will take it,' and I said, 'All right; it is up to you; I am satisfied.' " His account of what took place after Webb walked out and Betts came into the room is substantially the same as that given by the other witnesses. Webb testified positively that he did not first take Peters down to a saloon and treat him.

Counsel for plaintiff in error first argue that if he is guilty of any criminal offense in this case, under our statute it is the offense of an attempt to commit bribery and not the offense of bribery itself. Section 31 of the Criminal Code, so far as it applies to this question, reads as follows: "Whoever corruptly, directly or indirectly, gives any money or other bribe \* \* \* to any State's attorney \* \* \* after his election, \* \* \* either before or after he is qualified, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be then pending, or may by law come or be brought before him, in his official capacity, or to cause him to execute any of the powers in him vested, or to perform any duty of him required, with partiality or favor, or otherwise than as required by law, \* \* \* the person so giving, and the officer so receiving any money \* \* \* with intent or for the purpose or consideration aforesaid, shall be deemed guilty of bribery, and shall be punished by confinement in the penitentiary for a term not less than one year nor more than five years." Section 32 of the Criminal Code reads: "Every person who shall offer or attempt to bribe any \* \* \* State's attorney or other officer, ministerial or judicial, \* \* \* in any of the cases mentioned in the preceding section, and every such officer who shall propose or agree to receive a bribe in any of such cases, shall be fined not exceeding \$5000."

Bribery, under the common law, is usually defined to be the giving or receiving anything of value, or any valuable

service, intended to influence one in the discharge of a legal duty. (4 Am. & Eng. Ency. of Law,—2d ed.—907; 1 Russell on Crimes,—7th Eng. and 1st Can. ed.—627; 3 Greenleaf on Evidence,—16th ed.—sec. 71; 3 Wharton on Crim. Law,—11th ed.—sec. 2214; *Rex v. Vaughan*, 4 Burr. 2494.) At common law bribery was a misdemeanor, and the distinction between bribery and the attempt to bribe was of little practical importance, as the offer to bribe, though there was no acceptance or delivery of the gift or reward, was indictable and punishable in the same way as if there had been both delivery and acceptance. (*State v. Ellis*, 97 Am. Dec. (N. J.) 707, and authorities cited in note; *Rudolph v. State*, 116 Am. St. Rep. 32, and note.) In many States and jurisdictions, as in Illinois, separate statutes have been enacted as to bribery and the attempt to bribe and different punishments fixed for the two offenses. What are the necessary elements of the crime of bribery and that of an attempt to bribe will depend, therefore, quite largely upon the wording of the particular statute under consideration. In some jurisdictions, in order to constitute bribery the act of at least two persons is essential and it must be proved that the minds of the two concur, (*Newman v. People*, 23 Colo. 300; 2 Ency. of Evidence, 763;) while in others, upon the full and complete delivery of the bribe or money, so that it is out of the possession and control of the person making the delivery with the corrupt intention, on his part, of influencing the public official, the offense is complete, although the official received it in ignorance or retained it solely for the purpose of public justice. (*Commonwealth v. Murray*, 135 Mass. 530; *Henslow v. Farwett*, 3 Ad. & Ell. 51.) The gist of either offense is the tendency of the bribe to pervert justice. Such being the case, the attempt to bribe, as well as the completed act of bribery, is dangerous and injurious to the community at large, for, as this court has said in *Walsh v. People*, 65 Ill. 58, “the offer is a sore temptation to the weak or the de-

praved. It tends to corrupt, and as the law abhors the least tendency to corruption it punishes the act, which is calculated to debase and which may affect prejudicially the morals of the community." The legislature, in passing the two sections of the Criminal Code in question, evidently thought that the completed act was more serious and corrupting in its tendency than an ineffectual attempt to bribe. Reading these two sections together, did the legislature intend that in order to constitute the crime of bribery the acts of two persons were essential?—that of him who gives and him who receives, the minds of the two concurring? Or did they intend that the offense of bribery was complete if the public official took the money or other thing offered as a bribe but not with a corrupt intent? No one reading this record would for a moment contend that the State's attorney was guilty of bribery. In the common understanding of that term no one would argue that he had been bribed. If he, instead of having Betts receive the \$20, had in his interview told plaintiff in error positively that he would not accept the money under any circumstances and ordered him out of his office, it would hardly be contended that plaintiff in error would then be guilty of more than an attempt to bribe. Bishop, in discussing bribery and the attempt to bribe, says: "Since bribery is misdemeanor and attempt is the same it is of little consequence which form of the doctrine we follow, the result in either case being the same. But it promotes a desirable uniformity in the terms of the law to treat of the unaccepted offer as an attempt,—not as the substantive crime." (2 Bishop's New Crim. Law, sec. 88.) Greenleaf says: "The misdemeanor is complete by the offer of the bribe, so far as the offer is concerned. If the offer is accepted both parties are guilty." (3 Greenleaf on Evidence,—16th ed.—sec. 72.) If the offer is accepted with a corrupt motive both parties are guilty of bribery, even though the public official changes his mind and breaks his promise. (*Sulston v. Norton*, 3 Burr. 1235.)

This offer was not accepted by the State's attorney in any true sense of the meaning of that word. We must assume that the legislature had in mind, in the passage of these two sections of the Criminal Code distinguishing between bribery and the attempt to bribe, the common law as it existed at that time. This being so, the conclusion logically follows that they did not intend that a person should be guilty of the offense of bribery unless the bribe was accepted. It must therefore be held that plaintiff in error cannot, on the facts in this record, be held guilty of bribery.

Counsel further argue that plaintiff in error, under these facts, was not guilty even of an attempt at bribery. With this we do not agree. This case does not come within the reasoning of this court in *Love v. People*, 160 Ill. 501, where it was held that the offense of burglary there under consideration was committed at the instigation and encouragement of the owner of the premises, but rather comes within the reasoning of this court in *People v. Smith*, 251 Ill. 185, and *People v. Hartford Life Ins. Co.* 252 id. 398, where it was stated it was not in violation of the law to find out whether offenses were being committed and to take precautions to ascertain whether the suspected persons would commit the offense. The evidence justifies the submission of this last mentioned offense to a jury.

Counsel further contend that the court erred in refusing to permit plaintiff in error to testify as to his intention in giving the \$20 to Betts for the State's attorney. The prevailing rule of law, sustained by the great weight of authority, is, that whenever the motive, intention or belief of a person is relevant to the issue it is competent for such person to testify directly on that point. (Jones on Evidence,—2d ed.—sec. 170.) This court has held that where the intent is an important element constituting the offense the accused has the right to testify what his intention was in the commission of the act. (*Wohlford v. People*, 148 Ill. 296.) The court erred in not permitting plaintiff in er-

ror to answer the question. We do not think, however, we would reverse for that error alone, as a reading of his examination shows that he gave practically a complete statement as to what his intention or motive was.

For the reasons stated the judgment must be reversed and the cause remanded.

*Reversed and remanded.*

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JOHN HENRY, Appellee, vs. CHARLES BRITT, Appellant.

*Opinion filed October 16, 1914.*

1. DEEDS—*when a deed stands as mere security for money advanced.* Where a purchaser of land assigns his contract to a third person as security for payments to be made on the contract, and the assignee, on completing the payments, takes from the original vendor an absolute deed of conveyance, the deed will stand as mere security for the money advanced.

2. APPEALS AND ERRORS—*when a freehold is not involved.* A freehold is not involved on appeal from a decree holding a deed to be mere security for payments made by the complainant and ordering a conveyance to be made to him upon payment of the amount found due, as the complainant may or may not pay such balance.

APPEAL from the Circuit Court of Pulaski county; the Hon. A. W. LEWIS, Judge, presiding.

C. S. MILLER, and L. M. BRADLEY, for appellant.

CHARLES L. RICE, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

John Henry, appellee, by his amended bill in equity filed in the circuit court of Pulaski county against Charles Britt, appellant, Margaret A. Brown, executrix of the will of A. W. Brown, deceased, and Burton Bagby, guardian



of said Charles Britt, alleged that on August 1, 1904, J. B. Mathis, being the owner of the south-west quarter of the south-east quarter of section 29, in township 14, south, range 1, west of the third principal meridian, in the said county, made and delivered to the complainant a bond, also signed by his wife, Nellie I. Mathis, conditioned for the conveyance of said tract of land to the complainant for the sum of \$850, payable \$173 cash in hand and the remainder in annual payments of \$135 each, with interest at seven per cent; that complainant made the cash payment and entered into possession of the premises and has ever since been in possession thereof; that on May 1, 1905, said J. B. Mathis and Nellie I. Mathis, his wife, executed a quit-claim deed of said premises to A. W. Brown, subject to the terms and conditions of the bond for a deed, which were assumed by A. W. Brown; that in the year 1906 the complainant entered into an agreement with Grant Britt by which Britt agreed to pay to A. W. Brown the amount remaining due and unpaid by the terms of the bond, and upon complainant re-paying to him the amount so paid convey the premises to the complainant, and in pursuance of said agreement the complainant assigned to Grant Britt the bond for a deed; that on October 25, 1906, A. W. Brown died, and afterward the defendant Margaret A. Brown was appointed executrix of his will; that on December 14, 1906, Grant Britt died, leaving the defendant Charles Britt, a minor, his son and only heir-at-law; that on October 15, 1907, Margaret A. Brown, as executrix of the will of A. W. Brown, conveyed the premises to Charles Britt; that on October 19, 1908, H. M. Britt was appointed guardian of Charles Britt; that the complainant had paid to H. M. Britt, as guardian, the remainder of the purchase money due; that when the bill was filed the defendant Burton Bagby was guardian of Charles Britt, and that the complainant had demanded the execution of a deed, which was refused. The defendant

Margaret A. Brown, executrix of the will of A. W. Brown, deceased, by her answer admitted the making of the conveyance to A. W. Brown subject to the bond for a deed, and his death, and the conveyance by her, as executrix, to Charles Britt, so that there was no controversy as to any matter concerning her or A. W. Brown. The defendants Charles Britt and Burton Bagby, his guardian, answered that they were not informed as to the alleged purchase by the complainant from J. B. Mathis, or the payment of \$173, or of the deed from J. B. Mathis and Nellie I. Mathis, his wife, to A. W. Brown. They made no denial of the averments of the bill respecting the agreement between the complainant and Grant Britt and made no answer to such averments, but they denied that complainant had performed his obligation or had paid any sum to them or either of them, or on behalf of either of them, on the purchase price of the land, or that he had paid any taxes or assessments or performed his part of the agreement. They alleged that the only thing that the complainant ever gave them was a few loads of corn paid as rent, and they invoked the Statute of Frauds and Perjuries as against the agreement between the complainant and Grant Britt. There was therefore no issue made by the pleadings except the single question whether the complainant had paid the amount due, but, of course, it was necessary for complainant to prove the facts alleged which were not admitted. The chancellor heard the evidence, found the facts as alleged in the bill and stated an account between the complainant and Charles Britt and entered a decree finding that Charles Britt had attained his majority; that the balance due from the complainant was \$35.75, and ordering that upon payment of said sum Charles Britt execute and deliver a deed of the premises to the complainant, and in default of such conveyance a special master in chancery appointed for that purpose should execute the deed in his behalf. From that decree Charles Britt alone appealed.

At the hearing there was no dispute as to the making of the bond for a deed, the right of the holder of the bond to a conveyance upon payment of the stipulated amount, nor as to the conveyances alleged in the bill. The matter of fact in dispute was whether the complainant had repaid the advances made to complete the payments on the bond for a deed, and the question of law was whether the contract between him and Grant Britt was subject to the defense of the Statute of Frauds. The errors assigned and argued in this court are, that the oral contract between the complainant and Grant Britt could not be enforced in a case where the Statute of Frauds was invoked, as was done in this case; that if Grant Britt was a trustee under the alleged agreement it was void as an express trust, and that there was no resulting trust.

Where a purchaser of land assigns his contract to a third person as security for payments to be made on the contract, and the assignee, on completing the payments, takes from the original vendor an absolute deed of conveyance, the deed will stand as a mere security for the moneys advanced. (*Smith v. Cremer*, 71 Ill. 185.) In the case of a bill filed to enforce such an agreement the freehold is not involved and an appeal is required by law to be taken to the Appellate Court. The complainant in this case would not necessarily gain or Charles Britt lose the freehold, but the complainant would only be entitled to a conveyance upon payment of the balance found due, which he might or might not pay. The appeal should have been taken to the Appellate Court. *Kirchoff v. Union Mutual Life Ins. Co.* 128 Ill. 199; *Ryan v. Sanford*, 133 id. 291; *Adamski v. Wieczorek*, 181 id. 361; *Eddleman v. Fasig*, 218 id. 340; *Burroughs v. Kotz*, 226 id. 40.

The cause is transferred to the Appellate Court for the Fourth District.

*Cause transferred.*

THE VILLAGE OF HOMEWOOD, Appellee, vs. THOMAS S. GRANNISS, Appellant.

*Opinion filed October 16, 1914.*

1. SPECIAL ASSESSMENTS—*failure to hold a public hearing does not render an ordinance and all proceedings void.* Where an ordinance provides for the construction of a sidewalk with a berme of earth a public hearing is required, but the failure to hold such hearing does not render the ordinance and all other proceedings void, and such objection cannot be urged on the hearing under section 84 of the Improvement act, concerning the final certificate of the completion of the improvement.

2. SAME—*failure to hold public hearing does not deprive county court of jurisdiction.* It will be presumed when the board of local improvements recommends an ordinance for an improvement that a public hearing has been had if one is necessary, and the fact that no public hearing has been had does not deprive the county court of jurisdiction of the subject matter, and its judgment of confirmation is not, therefore, void but merely erroneous.

APPEAL from the County Court of Cook county; the Hon. JOHN E. OWENS, Judge, presiding.

WILLIAM J. DONLIN, for appellant.

OTTO F. REICH, (I. T. GREENACRE, of counsel,) for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county overruling the objections of appellant as to the final certificate of the cost of a special assessment for the construction of a sidewalk in the village of Homewood. The work was completed and accepted by the board of local improvements of that village and the final certificate issued accordingly. It is conceded that the finding is conclusive on all questions of fact. *Village of Nile's Center v. Schmitz*, 261 Ill. 467.

An ordinance was passed by the said village, under the Local Improvement act of 1897, for a special assessment for said improvement, and a petition to levy the assessment therefor was filed in the county court of Cook county. Judgment of confirmation against the property was thereafter entered in said court. The sole contention urged here is that said ordinance was void and that all proceedings were therefore a nullity. The basis of the argument of counsel for appellant on this question is, that under this ordinance a berme was to be constructed of earth along said sidewalk, in such manner and "of such size as to be one foot on each side of and flush with the top of the completed walk," sloping to the surface of the ground at the rate of one and one-half feet horizontal to one foot vertical; that as such berme was not, under the decisions, a part of such sidewalk a public hearing was required, and that no public hearing was had. This court has held that for a sidewalk constructed with a berme, as this was constructed, a public hearing should have been had by the board of local improvements. (*City of Chicago v. Bassett*, 238 Ill. 412; *Village of Glencoe v. Uthe*, 253 id. 518; *City of Chicago v. Edens*, 261 id. 272.) The record shows that it was agreed by the parties that no public hearing was held. If the failure to hold the public hearing makes the ordinance and all other proceedings in connection therewith absolutely void then this question can be raised on this hearing. (*City of Lincoln v. Harts*, 250 Ill. 273.) If the failure to have such public hearing makes the proceedings defective, only, then this question cannot be raised on a hearing, under section 84 of the Local Improvement act. The question has never been decided by this court. It was stated in *Village of Glencoe v. Uthe*, *supra*, that failure to have the public hearing rendered the proceeding "erroneous." The cases cited by counsel for appellant, such as *People v. Field*, 197 Ill. 568, *People v. Patton*, 223 id. 379, and *People v. Klehm*, 238 id. 89, were proceedings under the special Sidewalk act

of 1875 and are not in point on the precise question here involved. The main provisions as to public hearings under the Local Improvement act of 1897 are found in sections 7 and 8 of that act. Sections 8 and 9 provide that the board of local improvements shall prepare an ordinance for the improvement and present it, with their recommendation, to the city council or board of trustees, and section 9 states, among other things, that "the recommendation by said board shall be *prima facie* evidence that all preliminary requirements of the law have been complied with." It has been repeatedly held in construing this statute, that the burden of proof is upon the objectors to show non-compliance with the requirements preliminary to the improvement ordinance; that the recommendation of the board establishes the fact, *prima facie*, that all such preliminary requirements have been complied with. (*Chicago Union Traction Co. v. City of Chicago*, 202 Ill. 576; *Richards v. City of Jerseyville*, 214 id. 67; *Guyer v. City of Rock Island*, 215 id. 144; *City of East St. Louis v. Davis*, 233 id. 553; *People v. Belz*, 252 id. 296; *Leitch v. People*, 183 id. 569.) There is no provision in the statute requiring the board of local improvements, in their recommendation to the council or the board of trustees, to refer in any way to the question whether a public hearing has been had. It will be presumed, when the board of local improvements recommends the ordinance, that if a public hearing was required such hearing was had. It necessarily follows, therefore, that the county court, in entering the confirmation judgment, had jurisdiction of the subject matter. No question is raised as to the jurisdiction over the person of appellant in the confirmation proceedings in the county court. The county court having had jurisdiction in the confirmation proceedings both of the subject matter and the person of appellant, the failure to hold a public hearing would not render the entire proceedings void but only defective or erroneous.

The judgment of the county court will be affirmed.

*Judgment affirmed.*

THE FOUNTAIN CREEK DRAINAGE DISTRICT NO. 1, Defendant in Error, vs. AARON W. SMITH *et al.* Plaintiffs in Error.

*Opinion filed October 16, 1914.*

1. DRAINAGE—*record need not show affirmatively that commissioners have examined all the land.* While every fact essential to the jurisdiction of the county court to organize a drainage district under the Levee act must affirmatively appear in the record, yet the examination of the land by the commissioners, as required by section 9, is not a jurisdictional fact and need not affirmatively appear in the record.

2. SAME—*when failure of officer signing jurat to give his official character is not fatal.* The failure of the officer signing the jurat to an affidavit to state, after his signature, his official character is not fatal, where it appears from other papers in the record, including the file-mark on the affidavit itself, that such officer was county clerk and clerk of the county court.

3. SAME—*what does not invalidate the clerk's notice of hearing.* Under the Levee act the duty rests upon the clerk of the county court, upon the filing of a petition to organize a drainage district, to fix a time and place for hearing without any order of the court, and the facts that a petition is presented to the court and the court enters an order setting the same time and place as fixed by the clerk for the hearing does not invalidate the notice of the clerk even though the order is faulty.

4. SAME—*district may determine width of right of way needed.* A levee drainage district, being a corporation having the power of eminent domain, may in good faith determine for itself the width of the right of way needed for its ditches, and the courts will not interfere with its determination in that regard unless it appears there has been an abuse of discretion.

5. SAME—*owner's use of right of way not occupied by ditch is limited.* Under the Levee act the owner of land through which a right of way for a ditch is condemned owns the fee after condemnation, but he has only such right to use the land as is not inconsistent with the easement required by the drainage district.

WRIT OF ERROR to the County Court of Iroquois county; the Hon. JOHN H. GILLAN, Judge, presiding.

C. E. RUSSELL, and DYER & DYER, for plaintiffs in error.

A. F. GOODYEAR, and SAUM & MALO, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a proceeding in the county court of Iroquois county to establish under the Levee act a drainage district partly in Iroquois county and partly in Vermilion county. The petition was filed September 23, 1913, in the county court. At the time and place fixed in the notice of the clerk, given as required by the statute, the county court, after a hearing, decided that the petition was signed by a majority of the land owners owning more than one-third of the land in the proposed district and that the court had jurisdiction of the subject matter and all of the parties to the cause, and appointed three competent persons to act as commissioners to lay out the proposed district and make a report in accordance with the statute. Objections were filed to the commissioners' report by plaintiffs in error, which, after a hearing, were overruled, and an order was entered, in accordance with the provisions of section 16 of said act, organizing the district. From that order this writ of error has been sued out.

From the record it appears that the improvement is estimated to cost \$38,500, and that it extends about six and one-half miles north and south and about one and one-half miles east and west, and contains some 6000 acres, the proposed drains to be constructed being in part open and in part tile. The outlet of the drainage district is at the northerly end, into Pigeon creek, about 300 feet north of the north line of section 6, township 24, north, range 13, in Iroquois county. This main ditch or outlet is proposed to be constructed with a 100-foot right of way, and extends in a northerly and southerly direction entirely across said section 6. Plaintiffs in error own the south-east quarter of said section. The open ditch as proposed to be constructed through their lands will be 7 feet deep, 6 feet



wide at the bottom and 27 feet wide at the top. The 100-foot right of way across plaintiffs in error's land contains 6.71 acres.

Counsel for plaintiffs in error contend that the record fails to show that the county court had jurisdiction to organize the district. Every fact essential to the jurisdiction of the court to establish a drainage district under this act must be shown affirmatively in the record. (*Wayne City Drainage District v. Boggs*, 262 Ill. 338; *Drummer Creek Drainage District v. Roth*, 244 id. 68.) Section 9 of the Levee act, as amended in 1909, (Hurd's Stat. 1913, p. 923,) provides that "immediately after their appointment the commissioners shall examine all the land proposed to be drained or protected and the lands over or upon which the work is proposed to be constructed" and determine several things specified in said section. Counsel for plaintiffs in error argue that this provision as to requiring all the lands to be examined by the commissioners is mandatory and that the record must show affirmatively that they have done so; that such showing is jurisdictional, and that as this record does not show that fact affirmatively the case must be reversed. The entire report of the commissioners as to its bearing on this question, fairly construed, in our judgment does show affirmatively that they examined all the lands. But, waiving that question, we do not think the record must show that they have done this in order to give the court jurisdiction. This court has held that the report of the commissioners under this act is simply advisory in its character; that the court is not in any way bound by it. (*Sny Island Drainage District v. Shaw*, 252 Ill. 142; *Michigan Central Railroad Co. v. Spring Creek Drainage District*, 215 id. 501.) Said section 16 gives the form of the order for organizing the district and does not include within its terms any reference to the report of the commissioners. The report of the commissioners is not jurisdictional, as that word was used in the decisions first cited

in this opinion and relied upon by counsel for plaintiffs in error.

Counsel further contend that the affidavit filed by three signers of the petition, as required by section 5 of the act, stating that they have examined said petition and are acquainted with the locality of said district, and that the petition is signed by a majority of the owners, of lawful age, owning more than one-third of the area of the lands in the proposed district, was defective because it was sworn to before a person not shown by the record to have authority to administer oaths. The affidavit was sworn to before Clarence South, who did not give his official character after his signature to the jurat. This affidavit, however, with the jurat attached, was filed the same day it was sworn to, and marked, "Filed October 20, 1913.—Clarence South, county clerk and clerk of the county court." It appears from this record that Clarence South was county clerk and clerk of the county court, and he had authority, therefore, to administer oaths. The omission to affix the official description is not usually deemed material where the official character of the officer sufficiently appears from other papers in the cause. (2 Cyc. 31, and cases cited.) This court has held, under a similar state of facts, that it will be presumed that the affidavit was sworn to before the clerk. *Singleton v. Wofford*, 3 Scam. 576.

It is further contended that the county court lost jurisdiction of the case because by an order entered September 23, 1913, it referred to the petition as being filed September 22, when, as a matter of fact, it was filed September 23; that the county court was without jurisdiction to correct this order, as it attempted to do, on December 1, 1913, the term having expired. Under the Levee act the duty rests upon the clerk of the court, without an order of the court, to fix a time and place for the hearing, upon the filing of a petition. This was done, and the fact that a petition was presented to the court and the court entered an order

setting the same time and place as set by the clerk for the hearing does not invalidate the notice of the clerk, even though the order of the court was faulty.

Counsel for plaintiffs in error further argue that the court should have sustained objections to the organization of the district because the evidence presented proved that the 100-foot strip across their land was not needed; that a 66-foot strip was sufficient. Two witnesses, one a surveyor, testified for plaintiffs in error that a 66-foot right of way was adequate. Four other witnesses, who had experience in farming, thought that 100 feet was unnecessary but did not fix definitely what width would be needed. The report of the commissioner's recommended 100 feet. One of the engineers who prepared the plans and profiles introduced in evidence showing the character of the work, testified at some length with reference to these plans. He stated that a 100-foot right of way was required for the proposed ditch; that the plans called for an 8-foot berme on each bank, which would make a space of 43 feet between the inside edges of the spoil banks; that the spoil banks would require 20 feet on each side if the dirt were dumped evenly by the dredge, but as it was frequently necessary to dump it unevenly, more than 20 feet on each side would be required; that it would be necessary, on either side, to reach the ditch and right of way with wagons carrying coal or other supplies; that it was usual in digging ditches of this character in that county to have a right of way of 100 feet; that they might possibly get along with an 85-foot right of way on the Smith land but the spoil banks would run over in places.

This court has decided frequently that a corporation having power to exercise the right of eminent domain will be permitted a large discretion in determining for itself the amount of land necessary to be taken. This right, however, is subject to all the statutory and constitutional restrictions on the subject, and the courts are clothed with

the power to prevent an abuse. (*Bell v. Mattoon Water-Works Co.* 245 Ill. 544; *Terre Haute and Peoria Railroad Co. v. Robbins*, 247 id. 376.) If petitioner acts in good faith and shows a reasonable necessity for the condemnation, in view of its present and future business, its discretion will not be interfered with. (2 *Lewis on Eminent Domain*,—3d ed.—secs. 453, 601; *Pittsburgh, Fort Wayne and Chicago Railway Co. v. Sanitary District*, 218 Ill. 286; *Schuster v. Sanitary District*, 177 id. 626; *Smith v. Chicago and Western Indiana Railroad Co.* 105 id. 511.) This court, in considering the principle involved in this case in *Lockie v. Mutual Union Telegraph Co.* 103 Ill. 401, held that where the statute did not designate the width of the strip of land to be taken for telegraph purposes, a strip half a rod in width for a single line of poles was not unreasonable in amount. In construing the right to take land for right of way under the statute here under consideration, it was said in *Smith v. Drainage District*, 229 Ill. 155, that "if the court finds that the use for which the property is to be taken is a public one, then the court will not inquire into the extent to which the property is necessary for such use, unless it appears that the quantity of property taken is grossly in excess of the amount necessary for the use." No such abuse is shown on this record.

There is no force in the argument of counsel that the testimony of the engineer of the district, on cross-examination, to the effect that it did not make any difference to the owner how wide the right of way was, as after the ditch was dug he had the use of all not used for ditch purposes, shows that the proposed width was unreasonable. He had already testified positively that 100 feet was necessary, giving apparently good reasons for his opinion. He was the only witness of experience who had gone over the ground and made an accurate estimate. While under this act the owner retains, after condemnation, a fee in the land condemned, yet he would only retain such right to so use

the land as would not be inconsistent with the easement required by the drainage district. (*West Skokie Drainage District v. Dawson*, 243 Ill. 175.) That easement might require the district to come upon the strip to repair and look after the ditch. The fact that the engineer was mistaken as to the law does not destroy the value of his testimony as to the practical reasons why the district should have 100 feet for right of way.

The judgment of the county court will be affirmed.

*Judgment affirmed.*

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MATEJ CIGLER, Appellee, vs. MARY KEINATH *et al.*—  
(JOSEPH SPEVAK, Appellant.)

*Opinion filed October 16, 1914.*

1. BONDS—*undertaking of surety is strictly construed.* The undertaking of a surety is to be strictly construed and his liability is not to be extended by construction.

2. SAME—*provision of appeal bond construed as not covering rent.* An appeal bond given on appeal from an order granting a writ of assistance, the undertaking of which bond is that the appellants shall pay "the costs and damages rendered or to be hereafter rendered against them, in case said order shall be affirmed," covers only such costs and damages as have been theretofore rendered in the trial court and such additional costs and damages as may be rendered in the court of review, and does not cover the rental value of the premises during the period the appellee was deprived of possession pending the decision of the appeal. (*Shrefler v. Nadclhoffer*, 133 Ill. 536, distinguished.)

APPEAL from the Branch "B" Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding.

JOHN C. WILSON, for appellant.

CHARLES T. FARSON, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

Appellee, Matej Cigler, brought suit in the municipal court of Chicago against the appellant, Joseph Spevak, and others, upon an appeal bond. The municipal court rendered judgment for \$43.70 against appellant. Appellee sued out a writ of error from the Appellate Court for the First District, and that court reversed the judgment of the municipal court and rendered judgment for \$612.70 against appellant. The Appellate Court granted a certificate of importance, and appellant has prosecuted this appeal.

The circumstances under which the appeal bond was given are as follows: During the year 1907 appellee became the purchaser of certain real estate which was sold under decree of the superior court of Cook county. The period of redemption from the sale having expired, appellee obtained a master's deed to the premises and made application to the superior court for a writ of assistance. On March 30, 1909, the superior court ordered a writ of assistance to issue, and certain of the defendants who were in possession of the premises were allowed an appeal from that order to the Appellate Court for the First District. These defendants gave an appeal bond in the penal sum of \$1000, with appellant and others as sureties thereon. The condition of this appeal bond was as follows: "Now, therefore, if the said Mary Keinath, Ernest Keinath and Peter Rudolph shall duly prosecute their said appeal with effect and pay the costs and damages rendered or to be hereafter rendered against them, in case said order shall be affirmed, in said Appellate Court, then the above obligation to be void, otherwise to remain in full force and effect." In January, 1912, the Appellate Court affirmed the order of the superior court, the cause was re-docketed in the superior court, appellee obtained possession of the premises under

the writ of assistance on March 18, 1912, and suit was brought by appellee on the appeal bond.

In addition to the sum of \$43.70 which was adjudged against appellant in the superior court and Appellate Court in the suit in which the appeal bond was given, appellee in this suit sought to recover against appellant the rental value of the premises from March 30, 1909, to March 18, 1912, which by stipulation was fixed at \$534. The municipal court allowed the item of \$43.70 but rejected the item of \$534 in rendering judgment for the plaintiff. The Appellate Court reversed the judgment of the municipal court and rendered judgment against appellant for \$612.70, this amount being obtained by adding the item of \$534 to the item of \$43.70 and allowing interest on the total from December 21, 1912, at the rate of five per cent per annum. The only question presented for our determination is whether the rental value of the premises from March 30, 1909, to March 18, 1912, can be recovered in a suit against appellant, as surety, upon the appeal bond.

The law is well settled that the undertaking of a surety is to be strictly construed and his liability is not to be extended by construction. (*Cooper v. People*, 85 Ill. 417; *Tolman Co. v. Rice*, 164 id. 255; *Phoenix Manf. Co. v. Bogardus*, 231 id. 528.) The undertaking of appellant was to pay "the costs and damages rendered or to be hereafter rendered against them, in case said order shall be affirmed, in said Appellate Court." Unless the liability of appellant is to be extended by construction, the costs and damages referred to in the condition are only such costs and damages theretofore rendered in the superior court and such additional costs and damages as might thereafter be rendered in the Appellate Court. Such is the plain language of the condition. *Rothgerber v. Wonderly*, 66 Ill. 390.

Appellee relies chiefly upon *Shreffler v. Nudelhoffer*, 133 Ill. 536, in support of the judgment of the Appellate Court.

In that case Nadelhoffer had obtained a decree against certain parties dismissing their bill for injunction. The complainants prosecuted an appeal from the decree to the Appellate Court and gave an appeal bond, with Shreffler as surety thereon. The condition of the appeal bond was, that if the complainants in the bill "shall duly prosecute said appeal, and shall moreover pay all damages and damages growing out of the continuance of the injunction herein, costs of suit rendered and to be rendered against them" by the Appellate Court in case the decree should be affirmed in the Appellate Court, then the obligation should be null and void, otherwise to remain in full force. The Appellate Court affirmed the decree of the circuit court and Nadelhoffer brought suit against Shreffler on the appeal bond. The question presented to this court was whether Nadelhoffer, in the suit upon the appeal bond, could recover from Shreffler, as surety, the damages occasioned by reason of the continuance of the injunction pending the decision of the Appellate Court, and we held that recovery could be had against the surety for such damages. That case is not at all similar to the one at bar. There the appeal bond expressly covered "damages growing out of the continuance of the injunction herein." Here the appeal bond only covers "the costs and damages rendered or to be hereafter rendered against them \* \* \* in said Appellate Court." Had the bond covered all damages that might be sustained by reason of prosecuting the appeal to the Appellate Court, it might be urged with considerable force, under the authority of *Shreffler v. Nadelhoffer, supra*, that the reasonable rental value of the premises during the time the cause was pending in the Appellate Court could be recovered in a suit on the appeal bond.

Appellee in this suit can only recover the costs and damages awarded in the superior court and in the Appellate Court, amounting to the sum of \$43.70. Judgment



for that amount was rendered by the municipal court. The judgment of the Appellate Court is therefore reversed and the judgment of the municipal court is affirmed.

*Judgment reversed.*

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CHARLES E. ELY, Defendant in Error, *vs.* THE KING-RICHARDSON COMPANY, Plaintiff in Error.—ROBERT E. TROSPER, Defendant in Error, *vs.* THE KING-RICHARDSON COMPANY, Plaintiff in Error.—BERT E. MANVILLE, Defendant in Error, *vs.* THE KING-RICHARDSON COMPANY, Plaintiff in Error.

*Opinion filed October 16, 1914.*

1. ACCOUNTING—*when bill for accounting will lie on contract claim.* A court of equity has jurisdiction to entertain a bill for accounting even though the complainants' claims are based upon contract and there is no trust relation between the parties, where the amount of such claims can be ascertained only by an investigation of the accounts of the defendant and the books and papers in its possession, and the accounts themselves are so complicated that it would be difficult to present them to a jury in a manner which would enable the jurors satisfactorily to determine the amount due.

2. SAME—*when the complainants are not barred by their own wrong.* Even though the conduct of agents toward their employer is inconsistent with good faith and constitutes such a breach of contract as justifies their discharge, they do not for such reason forfeit their right to compensation earned before the time of their wrongful acts, and they are entitled to maintain a bill for an accounting for the purpose of determining the amount so due them.

3. SAME—*when it is not error to require defendant to turn over notes to complainants.* In accounting it is not error to require the defendant to turn over notes in its possession to the complainants, where the defendant, though having title to the notes, is not substantially interested in them, whereas the complainants are entitled to the proceeds of the notes when collected and are therefore substantially interested in their collection.

4. COSTS—*costs of appeal should not be taxed to the appellee if modification of decree is immaterial.* If the modification of a decree by the Appellate Court is immaterial the costs of the appeal should not be taxed against the appellee.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

BOYLE, MOTT & HAIGHT, for plaintiff in error.

ALDEN, LATHAM & YOUNG, for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

Three separate bills in chancery were filed in the circuit court of Cook county against the King-Richardson Company praying for an accounting and other relief. Answers were filed, the causes were referred to a master, and a hearing by the chancellor resulted in decrees granting the relief prayed for. The defendant prosecuted appeals to the Appellate Court for the First District, which modified the decrees. Upon petitions presented by the defendant, writs of *certiorari* were awarded from this court and the causes have been consolidated for hearing, the questions in all the cases being identical.

The business of the King-Richardson Company is the publication and sale of books through the agency of canvassers. It maintains an office in Chicago for the sale of its publications. The business of this office was conducted by the three complainants, who were called department managers, all the territory in which such business was carried on being divided among them and the entire expense of the maintenance of the office and the conduct of the business in Chicago being divided among them in proportion to the amount of their sales. They were employed under separate written contracts, which gave to each the control of certain territory and the exclusive right to sell the company's publications therein for the period of three years, from January 1, 1908, to December 31, 1910. Each agreed to devote his time and attention exclusively to the management and de-

velopment of the sales of the company's publications upon terms and conditions authorized by it. The duties of each were to employ suitable men as field managers and solicitors of sales; to organize and direct them; to require them to furnish adequate security to cover all money advanced and merchandise shipped to them; to conduct necessary correspondence and keep complete records of their work; to employ and manage the office force employed exclusively in his department; to supervise accounts and co-operate with the auditing department for their prompt collection; to travel in his territory when necessary for the interest of the business; to do all in his power to further the interest of the company and to follow its instructions in the conduct of his department. The company agreed to pay each of the department managers a salary of \$150 a month and necessary traveling expenses when working outside the city of Chicago in connection with the business of his department, and at the end of each calendar year to allow him commissions in addition to his salary and expenses, to be determined by charging him with his salary and personal expense account and all salaries, commissions, due bills and allowances to all employees in his department, together with thirty-nine per cent of the retail price of all books sold by his department and the actual cost of prospectuses and outfit supplies used therein, and crediting him with all cash receipts from business transacted by his department, plus the credit balance, or less the debit balance, arising from the settlement of the office expense account. In settling this latter account the manager was to be charged with all salaries of stenographers and other office assistants engaged exclusively in the conduct of the business of his department, all stationery, printed matter, office supplies, postage, telegrams, telephone tolls and express used in his department, and that proportion of the total expense of the maintenance of the Chicago office which the net sales of his department

bore to the total net sales of the office, and he was to be credited with nine per cent of the retail price of the total net sales of his department, except for 1908, when he was to be credited with ten per cent. The manager was entitled to any excess of receipts above the total charges against him, and was to be furnished commission statements not later than October 25 of each year, including accounts to October 1, and thereafter not later than the twenty-fifth day of each month, showing accounts up to the first day of the same month, until all business of the fiscal year should be closed. Remittances for sales were made directly to the company and were applied first to the payment of the charges mentioned in the contracts of employment of the department managers. Subsequent collections, as received, were credited to the department managers, and it was the practice of the auditor to give to each of the department managers at the end of each month a check for all money collected from the business in his territory. Some of the accounts prior to July 16, 1910, had been settled by the giving of notes, and these notes had been indorsed by the company's auditor and delivered to the complainants, respectively, and charged to them as if they had received so much money. On July 16, 1910, the complainants were discharged by the company without notice and excluded from its office. The company took possession of the notes mentioned, which were in the desks of the complainants in the company's office. Soon after, the complainants filed these bills for an accounting of the business done prior to 1910, that year not being included because the contracts provided for the accounting in October of each year. Besides the money collected and standing to their credit the complainants demanded that the notes should be delivered to them as well as the uncollected accounts, and all contracts, surety agreements and correspondence relating thereto. The decree required the payment by the company, in each

case, of the amount of money received by the company and due to the complainant, and also the delivery of the notes and accounts and the contracts and correspondence concerning them. The modification made by the Appellate Court consisted only in the addition to that part of the decree which required the delivery of the notes to the complainants, of the words, "which notes shall be indorsed 'without recourse,' by the defendants."

Although the complainants' claims were based upon contracts and there was no trust relation between the parties, it is manifest that the amount of those claims, respectively, could be ascertained only by an investigation of the accounts of the plaintiff in error and the books and papers in its possession, and that the accounts themselves were so complicated that it would be difficult to present the various items to a jury in such a manner as to enable the jurors satisfactorily to determine the amount due. In such case it is well settled in this State that a court of equity has jurisdiction to entertain a bill for an accounting. *Miller v. Russell*, 224 Ill. 68; *Townsend v. Equitable Life Assurance Society*, 263 id. 432.

It is argued on behalf of the plaintiff in error that the complainants are not entitled to any relief in equity because they do not come into court with clean hands. This contention is based upon the fact that the complainants during the year 1910, while they were in the employ of the plaintiff in error, began the organization of a rival corporation in the same business, under the name "The W. E. Richardson Company," for the purpose of carrying on business in competition with the plaintiff in error. It is claimed that the complainants attempted to induce a number of the employees of the plaintiff in error to enter the employment of the new corporation, and in several cases did induce employees of the plaintiff in error to enter into contracts with the W. E. Richardson Company which were to take effect

before their contracts with the King-Richardson Company expired. It was because of this conduct that the plaintiff in error discharged the complainants in July, 1910. Even if the conduct of the complainants was inconsistent with good faith to their employer and constituted a breach of their contract, they did not thereby forfeit the compensation which they had before earned. They might be liable for damages for the breaches of their contracts,—perhaps they might be enjoined from pursuing a course of conduct inconsistent with their contract obligations,—but they could not be deprived of their compensation already earned. The accounting sought was only in reference to the business of preceding years which was completed. The rights of the respective parties as to this business were settled, while no accounting of the business of 1910 was due for several months after the bills were filed. There was nothing unlawful or contrary to good morals or public policy in the original contracts of employment, and there is no reason why the complainants should not have an accounting as to their compensation under them. The maxim that he who comes into equity must do equity cannot deprive the complainants of their right to an accounting which is not founded in any way upon their wrongful conduct.

The notes and accounts arising out of the business for the years prior to 1910 were the property of the plaintiff in error. Their amount, when collected, would be immediately due and payable to the complainants according to the express terms of the contracts, the plaintiff in error having already received all that it was entitled to under the contracts. The contracts contained no express requirement upon the plaintiff in error to collect these notes and accounts. Their only provision in this regard was that the complainants should supervise accounts and co-operate with the auditing department for their prompt collection. Whether the discharge of the complainants was justified or not, whether

the severance of the relations between the parties was the result of a wrong on the one side or the other, the carrying out of the terms of the contract in regard to the collection of these debts would be attended with difficulty, and unsatisfactory. The plaintiff in error having no interest in the collection of the debts had no incentive to diligence, and the complainants having no control of the evidence of indebtedness would be subject to inconvenience in making collections. The complainants were the only persons interested in the collection of the debts, and the plaintiff in error was in reality only an intermediary or conduit through which the money must pass. A court of equity having jurisdiction of the subject matter of the accounting between the parties under these contracts, might have appointed a receiver for the collection of these claims. Since the plaintiff in error, though having the title, was without any substantial interest, it was not inequitable for the court, instead of appointing a receiver, to require the delivery of the property itself to the complainants, who alone were beneficially interested in the proceeds. The notes had already been delivered to them and the auditor of the plaintiff in error had attempted to indorse them, though his authority to make such indorsement is denied by the plaintiff in error. The decree required the delivery of the notes to the complainants but did not require any further indorsement of them by the plaintiff in error. The modification of the decree by the Appellate Court was therefore immaterial. To make the decree effective it was necessary that the complainants should have access to the itemized statements showing payments on account and correspondence referring to the payment and collection of the accounts, and the court properly required that such statements or correspondence, or copies thereof, should be delivered to the complainants.

Before the filing of the answer the complainants made a motion for an order directing the plaintiff in error to

deliver to the complainants the notes and accounts in controversy, or give security for their collection and the payment of the amount collected to the complainants at the termination of the cause. This motion was referred to the master and a large amount of evidence was taken upon this reference. The motion was never brought to a hearing, and it is insisted that the costs of taking this evidence should not have been taxed against the plaintiff in error, as it was by the decree. There was later a general reference of the cause to the same master, and it was stipulated that the evidence taken on the reference of the motion should stand as evidence under the general reference, and such evidence was considered on the final hearing. It is insisted that the court had no jurisdiction to grant the motion, and that therefore the costs made on the reference of the motion should not be taxed to the plaintiff in error. Whether the court could grant the motion or not, the evidence taken was pertinent to the issues in the cause and was properly taken and considered in the cause. The taking of it added nothing to the costs in the cause, and the court did not abuse its discretion in taxing all the costs against the plaintiff in error.

The complainants have assigned cross-errors on the judgment of the Appellate Court taxing the costs of the appeal against them. We have held that the modification of the decree by the Appellate Court was immaterial. The costs should not, therefore, have been adjudged against the appellees there, and their assignment of cross-errors will be sustained.

The judgments of the Appellate Court are reversed and the decrees of the circuit court affirmed, the costs of all courts to be paid by the plaintiff in error.

*Judgments reversed.*



HAMLIN'S WIZARD OIL COMPANY, Defendant in Error, vs.  
THE UNITED STATES EXPRESS COMPANY, Plaintiff in  
Error.

*Opinion filed October 16, 1914.*

1. EVIDENCE—*what evidence is prima facie sufficient to establish a forgery.* In a civil case, proof that the indorsement on a check or draft is not in the handwriting of the purported indorser is sufficient, *prima facie*, to establish a forgery and justify a judgment based upon the fact of such forgery without proof, in the first instance, that the party writing the indorsement was not authorized to do so.

2. SAME—*when defendant cannot object to entries in books of account.* Where the defendant in a civil suit offers in evidence entries in the plaintiff's books of account to establish credits in the defendant's favor on the assumption that the entries were competent evidence of admissions by the plaintiff, the defendant cannot deprive the plaintiff of the benefit of other entries in the books relating to the same subject matter by objecting to such entries on the ground that it appeared the books had not been honestly kept.

3. BILLS AND NOTES—*what does not defeat action to recover because of forged indorsements.* In a civil suit to recover the amount of certain checks and drafts cashed by the defendant on alleged forged indorsements of the plaintiff's name, the fact that plaintiff might have brought actions against the makers or other indorsers does not affect the right of action against the defendant.

4. SAME—*general rule as to indorsement of commercial paper.* The general rule is, that a person or corporation called upon to act upon the faith of a written instrument, including an indorsement of commercial paper, must ascertain its genuineness at his peril; and this rule rests upon public policy and is necessary for the security of commercial transactions.

5. SAME—*when express company is liable because of forged indorsements.* Where an express company, in payment for money orders, accepts checks and drafts payable to a business corporation and bearing indorsements forged by an employee of the corporation, who converted the money orders to his own use, the express company is liable to the corporation for the amount of such checks and drafts, notwithstanding the corporation might have prevented the fraud had it used care in examining its books, which were kept by the employee, there being no question in the case of authority or apparent authority to make the indorsements as agent.

6. NEGLIGENCE—*where there is no legal duty to exercise care there is no negligence in law.* While negligence is frequently defined as the failure to exercise that degree of care which ordinarily prudent persons are accustomed to exercise under like circumstances, yet it is an essential ingredient that there be a violation of a legal duty, and where there is no legal duty to exercise care there is no negligence in law.

WRIT OF ERROR to the Branch "D" Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. COTTRELL, Judge, presiding.

WINSTON, PAYNE, STRAWN & SHAW, (SILAS H. STRAWN, EDWARD W. EVERETT, and WALTER H. JACOBS, of counsel,) for plaintiff in error.

HAMLIN & TOPLIFF, (LOUIS M. GREELEY, and MORRIS ST. P. THOMAS, of counsel,) for defendant in error.

MR. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The Appellate Court for the First District affirmed a judgment recovered by defendant in error, Hamlin's Wizard Oil Company, upon a verdict directed by the municipal court of Chicago against the plaintiff in error, the United States Express Company, for \$20,107.08, the amount of one hundred checks and drafts, with interest thereon, which were payable or indorsed to the order of the defendant in error and which the plaintiff in error received and collected under indorsements of the defendant in error which were alleged to have been forged. A writ of *certiorari* was granted for the purpose of reviewing the judgment of the Appellate Court.

Plaintiff is a corporation which was engaged for more than twenty years in the manufacture and sale of proprietary medicines. It employed a large number of traveling men engaged in selling its products throughout the United

States and Canada, and their salaries and expenses were paid by express money orders. It also used money orders to pay claims of its customers against it. Defendant is a corporation which during the same period was engaged in the business of transmitting money, merchandise and other property by express, and it maintained an office in Chicago where it issued money orders to its patrons. During the period mentioned the plaintiff purchased all of its money orders from the defendant and used them in the same manner as checks or drafts, as a convenient method for transmitting funds to its traveling men and customers. In 1899 A. M. Walsh was employed by the plaintiff in its advertising department and in 1901 he was placed in charge of the company's books, and from that time until February 15, 1910, when he disappeared, he had entire charge of the books, including the journal, cash book, day book and ledger. He was found dead in Philadelphia on March 1, 1910, and an audit of the books kept by him showed that he had, during his employment as book-keeper, defrauded the corporation of about \$50,000. The suit was begun as a first-class case based on an implied contract, and the claim filed covered the period not barred by the Statute of Limitations. Remittances by checks and drafts received from customers passed through the hands of Walsh, and he entered them upon the books and acknowledged their receipt. He paid bills, had charge of the bank account, transmitted funds to the traveling men and customers, and was given checks for large sums of money, payable to his order, to pay freight and other accounts and to buy money orders and supply cash for the petty cash drawer. During his employment as book-keeper he was sent every four or five days to the defendant to buy money orders for remittances by the plaintiff and was furnished with checks for that purpose drawn by the corporation through its proper officers, payable to his order, and he was furnished with a written list of the money orders to be purchased. Sometimes he

was given a check for part and cash for the remainder, and sometimes the check exceeded the total of the money orders. It was his duty to buy the money orders mentioned in the list with the funds provided and to bring back the money orders and whatever cash balance there might be if the checks exceeded the amount of the orders, and he always returned from the defendant's office with the proper money orders and the cash balance, if there was any. The one hundred checks and drafts sued for were remitted by customers and were drawn or indorsed payable to the order of the plaintiff and came into his hands, and upon them it was alleged that he forged the indorsement of the plaintiff and with them bought money orders. The defendant received the checks and drafts sued for and issued to the plaintiff three hundred and eighty-two money orders in exchange for them, all of which contained on their face, "Name of remitter, Hamlin's W. O. Co." Some of these orders were payable to the order of persons with whom the plaintiff never had any dealings, and others were payable to the order of traveling men or customers and bore the genuine indorsement of the payees and were charged to them on the books by Walsh, so that the plaintiff had the benefit of the latter orders. Other orders were payable to salesmen and customers, but Walsh disposed of them and did not charge the amounts to the salesmen or customers or credit them to the plaintiff. One hundred and twelve of the money orders were issued to traveling men and customers and were charged to them on the books, and two hundred and seventy were either payable to persons with whom the plaintiff never had any business or were not charged on the books or used for its benefit. The frauds of Walsh were covered up by falsifying his books of account. He began his forgeries as early 'as 1902 and continued until he left the plaintiff's employment. The checks and drafts were indorsed in this form, "Hamlin's Wizard Oil Co., J. A. Hamlin, President," or the signature appended was

that of L. B. Hamlin, president, or L. B. Hamlin, vice-president, L. B. Hamlin having become president after the death of J. A. Hamlin.

The plaintiff offered in evidence the one hundred checks and drafts, together with testimony that the indorsements thereon were not in the handwriting of the officers of the plaintiff appearing thereon but were in the handwriting of Walsh, and closed its case in chief. It is contended that the court was not authorized to direct a verdict because such evidence was not sufficient to establish a forgery, but plaintiff was bound also to prove that the officers, J. A. Hamlin and L. B. Hamlin, never authorized Walsh to sign their names or the name of the company for the purpose of indorsing the checks. It has been held that in a civil case evidence that an indorsement is not in the handwriting of the alleged indorser is *prima facie* sufficient to justify a judgment based on the fact that the indorsement is not a valid indorsement of the payee. (*Schroeder v. Harvey*, 75 Ill. 638.) The evidence established *prima facie* that the indorsements were not indorsements of the plaintiff.

The books were not honestly kept by Walsh and did not truthfully represent the accounts, but the defendant offered in evidence various entries in them to show that for the checks and drafts it had issued money orders which the plaintiff received and charged upon the accounts. By that means the defendant proved that one hundred and twelve of the money orders were so charged to the payees on the books, and on cross-examination of defendant's witness the plaintiff read other entries in the books, to which the defendant objected. There was no preliminary proof that the books were books of original entry and no objection was made on that account, but the entries were objected to because it appeared from the testimony that the books were not honestly kept. The defendant, in offering entries from the books, assumed that they were competent evidence of admissions by plaintiff, and having used them to establish

credits in its favor it could not be permitted to deny plaintiff the benefit of what appeared therein relating to the same subject matter. *Boudinot v. Winter*, 190 Ill. 394.

The plaintiff had the checks and drafts at the trial and offered them in evidence, and it is argued that it ought not to recover their amount, because the makers were still liable thereon, and should only recover some special damage between the time the checks and drafts were fraudulently disposed of and their return to the plaintiff. There was no evidence upon which this claim could be based since there was nothing tending to prove that the plaintiff owned the checks, and if the plaintiff did own them, the fact that it might have had actions against the drawers or some other indorser would not affect its right of action against the defendant.

The important question in the case is whether the negligence of the plaintiff which was proved would defeat the action. During the nine years when Walsh was in the employ of the plaintiff it never took any steps to ascertain the method by which he was conducting its business or whether his books were truthful and correct. No examination of his books or accounts to ascertain their correctness was made. The one hundred checks in question were cashed during a period of five years in accordance with a course of business that had continued for over nine years, and any examination of the books would have discovered the fact. He was given checks, payable to his order, to buy money orders, and indorsements on many of them showed that they were not used for that purpose. The checks and drafts received from customers were to be stamped for deposit and deposited in the bank to the credit of the plaintiff, and no attempt was made to see that the checks or drafts so received were deposited and the treasurer did not examine the bank balance during the time of Walsh's employment. Part of the checks were cashed in saloons or to persons with whom the plaintiff had no dealings, as shown

by the indorsements, and they were never examined by any officer of the company to find out what Walsh had done with the proceeds. The evidence tended to prove that the exercise of ordinary care, such as may be expected of business men, was not exercised, and by reason of failure to exercise such care Walsh was enabled to continue his forgeries and frauds.

While negligence is frequently defined as the failure to exercise that degree of care which ordinarily prudent persons are accustomed to exercise under like circumstances, it is an essential ingredient that it involves the violation of a legal duty, and where there is no legal duty to exercise care there is no negligence in law. The question, then, is whether the plaintiff owed the defendant a legal duty, on account of the relations of the parties, to exercise ordinary care for the safety of the defendant in dealing with the checks and drafts. The general rule is, that a person or corporation called upon to act upon the faith of a written instrument, including an indorsement of commercial paper, must ascertain its genuineness at his peril. The principle rests in public policy and has been universally considered necessary for the security of commercial transactions. In *Jackson Paper Manf. Co. v. Commercial Nat. Bank*, 199 Ill. 151, the court quoted with approval this statement: "No equitable considerations can be invoked to soften seeming hardships in the enforcement of the laws and rules fixing liability on persons handling commercial paper. These laws are the growth of ages and the result of experience, having their origin in necessity. The inflexibility of these rules may occasionally make them seem severe, but in them is found general security." The rule was enforced with all its rigor in *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516, in which a customer whose checks had been collected under a forged indorsement was sued to compel him to pay the checks a second time. The checks had been mailed by the defendant to the plaintiff and received by

the plaintiff and afterward plaintiff's indorsements were forged by its own clerk and book-keeper, and it was held that the plaintiff was not precluded from recovering on the checks from the drawer because of negligence in not discovering, by an examination of its books, that the clerk had previously forged and collected many checks sent to it by its customers covering a period of two or three years. Another case in which the rule was emphatically stated is *People v. Bank of North America*, 75 N. Y. 547, which was a suit against a bank to recover for drafts payable to the order of the State treasurer, on which a clerk in his office had forged the treasurer's indorsements. The referee found that the acts of the clerk in indorsing and diverting from their proper use the drafts in suit were such that the exercise of ordinary care on the part of the treasurer would have discovered and prevented them. The court said that the defendant sought to base an estoppel against the plaintiffs on that finding, but held that plaintiffs were not estopped and that negligence was no defense. We have been referred to no decision conflicting in any way with these. In the case of *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, one who assumed to be an agent of the payee of checks wrote indorsements in the plaintiff's name, signed by himself in his own name as agent for the plaintiff. The question was whether the person who made the indorsements had apparent authority to make them as agent of the plaintiff, and it was held that if the course of dealing between the agent and third persons was such as to justify them in believing that he possessed the requisite authority the plaintiff would be estopped from disputing it. That is a well established doctrine of agency. If one permits another to clothe himself or to be clothed with apparent authority to act as his agent, any person who has been induced to rely and act upon the appearance of authority can invoke the estoppel. That was the basis of the decision in *Bartlett v. First Nat.*



*Bank of Chicago*, 247 Ill. 490, where the plaintiffs knew their agent was drawing drafts against them with which to obtain money from the banks to pay for grain and was wrongfully indorsing the names of the payees upon the drafts, and permitted him to continue drawing and indorsing drafts without informing the banks who were handling the drafts of that fact. In this case there was no question of that kind. Walsh had no express authority and never assumed to indorse any checks or drafts as agent of the plaintiff. What he did was to sign, without authority, the names of officers of the corporation, and the plaintiff had no actual knowledge of the fact.

There is a rule which obtains between banks and depositors quite similar to that which is applied wherever accounts are rendered, and that rule is that depositors must exercise reasonable care in examining returned statements and canceled checks and give prompt notice of irregularities discoverable by such care. That rule is adopted so that the bank may not only be able to proceed promptly against guilty parties, but may be put on its guard and protect itself from similar fraud in the future. It cannot be applied in this case, where accounts were never returned to the plaintiff by the defendant and neither a statement of account nor vouchers were ever returned. That the plaintiff was grossly negligent in the management of its affairs can scarcely be doubted, but under the law as declared by all the authorities that fact was not a defense.

There was no substantial error in ruling on the admission of evidence and none which could have affected the result. There was no controverted question of fact which it was necessary to submit to a jury, and the municipal court did not err in directing a verdict.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

• ELNA HAKANSON, Appellant, vs. THE LASALLE COUNTY  
CARBON COAL COMPANY, Appellee.

*Opinion filed October 16, 1914.*

**MINES**—*when question whether place of injury was a coal mine should go to jury.* Whether the place of injury was a coal mine, within the meaning of the Mines and Miners act, is a question for the jury, where the evidence shows that the defendant, for about six months prior to the accident, had employed more than twenty miners in opening entries and roadways; that main entries were driven east, west, north and south and entries opened off of them, the total length of all entries and roadways opened being some 2000 feet; that from 1600 to 2400 tons of coal had been taken out and that tracks and switches had been laid, although considerable work remained to be done to complete the plant. (*Moore v. Der-ing Coal Co.* 242 Ill. 84, distinguished.)

**APPEAL** from the Appellate Court for the Second Dis-trict;—heard in that court on writ of error to the Circuit Court of LaSalle county; the Hon. EDGAR ELDREDGE, Judge, presiding.

J. L. MURPHY, and BROWNE & WILEY, for appellant.

MCDUGALL, CHAPMAN & BAYNE, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellant, Elna Hakanson, filed her declaration in the circuit court of LaSalle county against appellee, the LaSalle County Carbon Coal Company, to recover damages for the death of her son, Hakan Bengtson, July 3, 1907, while in the employ of appellee. The declaration contained three counts, and based appellant's right of recovery on appellee's willful failure to comply with the provisions of the Mines and Miners act. The first count alleged appellee willfully violated the law by allowing appellant's intestate, Hakan Bengtson, to enter the mine and work therein before all conditions had been made safe and while dangerous con-

ditions existed in said mine and shaft. The second count alleged appellee on the day of the accident willfully violated the statute by failing to cause the shaft and equipment to be examined by a duly qualified examiner and to perform the duties as required by the statute. The third count alleged appellee failed to equip said shaft, or the compartments thereof, with substantial cages, but willfully equipped the same with a cage not covered and with nothing to protect those riding thereon from falling objects, and that by reason of such failure of appellee, Bengtson, on July 3, 1907, while riding on such cage, was struck and killed by certain pipes of appellee falling and striking him. Appellee pleaded the general issue. A trial by jury was had, and at the close of all the evidence appellee filed a motion to direct a verdict of not guilty, on the ground that the evidence did not show that the place of injury was at that time a coal mine, and that the Mining act, upon which the cause of action was founded, had no application. This motion was sustained. An appeal was taken to the Appellate Court, where the judgment of the circuit court was affirmed. The cause comes to this court upon a certificate of importance granted by the Appellate Court.

Appellee, a corporation engaged in the business of mining coal, decided to sink shafts and open up a mine at Cedar Point. For that purpose it caused two shafts to be sunk to and through the vein of coal a depth of about 540 feet. One was for a hoisting shaft, the other an escapement shaft, and they were a little more than 200 feet apart. The sinking of the shafts was completed in January, 1907, and a force of between twenty and thirty men began opening entries or roadways and air-courses. Appellant's intestate was a coal miner employed in this line of work. While in the shaft on an open cage, or "float," for the purpose of assisting in the removal to one corner of the shaft of a column of pipe jointed together and 420 feet in length, the joints came apart and the pipe fell, instantly killing him.

It is not and could not reasonably be denied that if the Mines and Miners act applied the cause should have been submitted to the jury. The only question to be determined is whether there was any evidence tending to show the place of injury to have been at that time a coal mine within the purview and meaning of the Mining act. If there was, the motion to direct a verdict for appellee should have been denied and the issue submitted to the jury.

The Mines and Miners act provides in much detail for the construction, operation and inspection of coal mines. Paragraph (a) of section 2 of the act in force when the accident occurred, provided that "any shaft in process of sinking, and any opening projected for the purpose of mining coal, shall be subject to the inspection of the State inspector of mines." Paragraph (d) of section 2 required every hoisting shaft to be equipped with substantial cages fitted to guide-rails running from top to bottom, and furnished with suitable boiler-iron covers to protect persons riding thereon from falling objects. Section 18 of the act provided a mine examiner shall be required at all mines, and that he shall visit the mine before the men are permitted to enter it, examine the air current and "inspect all places where men are expected to pass or work." He shall post notices in working places where dangerous conditions exist and report the same to the mine manager, and shall make a daily record each morning of the condition of the mine as he found it, which record shall be preserved, and no one shall be allowed to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe. Section 24 required the operator of every mine where miners are paid by weight for their output, to provide scales for the weighing of the coal. Section 34 was as follows: "In this act the words 'mine' and 'coal mine,' used in their general sense, are intended to signify any and all parts of the property of a mining plant, on the surface or underground, which con-

tribute, directly or indirectly, under one management, to the mining or handling of coal. \* \* \* The term 'shaft' means any vertical opening through the strata which is or may be used for purposes of ventilation or escapement, or for the hoisting or lowering of men and material in connection with the mining of coal."

The proof shows that for about six months prior to the accident which resulted in the death of Bengtson appellee kept employed underground more than twenty miners opening entries and roadways. Main entries were driven east, west, north and south, and other entries or roadways were opened off the main entries and some work done turning rooms off the last named entries. A roadway or air-course nine feet wide and seven feet high was opened from the main north entry to the escapement shaft. The total length of all entries and roadways opened was something more than 2000 feet. Tracks and switches were laid and the coal taken out was hauled in coal cars over these tracks to the bottom of the shaft by mules and hoisted to the top. Some of the coal was taken to the boiler-house and some of it was loaded on railroad cars and shipped away. Appellee's engineer estimated the coal hoisted before Bengtson's death at from 1600 to 2400 tons. This work was necessary before a larger force of men could be employed and the mine operated on a large scale. The entries were to be connected by roadways around a pillar 500 feet square surrounding the hoisting shaft, before a full force of men could be employed underground. Considerable work was done in opening entries or roadways around the pillar to connect with the main north, south, east and west entries, but this work had not been completed at the time of the accident. In opening the entries and roadways the work was done by coal miners, who took down the coal in the usual way, brushed and propped the roof, loaded the coal in cars, which were hauled by mules in charge of drivers employed for that purpose, to the shaft and hoisted in cages

to the top. The plant had not been completed to the extent that everything had been installed which was intended to be used when the underground work had progressed to the extent that a larger force of miners could be put to work in taking out coal, but the proof shows the equipment in use was sufficient for the work that was being done. It is true, a good deal of rock and other material had been taken down and hoisted, as well as coal; that scales had not been installed, and that the tippie as designed for use when the plant should be ready for operation upon a larger scale, with a larger force of men, had not been completed, but it seems to us the evidence certainly tended to show that the plant was being operated as a coal mine to such an extent as to bring it within the requirements of the Mines and Miners act.

This case is unlike *Moore v. Dering Coal Co.* 242 Ill. 84. In that case a main shaft had been sunk through the vein of coal. The material taken out, including the coal at the bottom of the shaft, was hoisted in a bucket. No coal was taken out except what was necessary in sinking the shaft. The death of the employee for which the suit was brought occurred in an air-shaft which was in process of being sunk but had not been completed. The men were engaged in blasting and taking out rock, which was hoisted in a bucket. The men went up and down this shaft in a bucket, which was hoisted and lowered by means of an engine and drum. Before coal had been reached in the air-shaft, and while two men were being let down into it by the bucket, the cable slipped off the drum and one of them fell and was instantly killed. The jury found, in answer to special interrogatories, that the opening was not used for ventilation or escapement or for the hoisting or lowering of men and material in connection with the mining of coal. A judgment rendered in favor of defendant on these special findings was affirmed by this court. We think there is a wide distinction between that case and the one before us.

In our opinion the case should have been submitted to the jury.

The judgments of the Appellate Court and circuit court are therefore reversed and the cause remanded to the circuit court.

*Reversed and remanded.*

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JOHN CHRISTENSEN, Plaintiff in Error, *vs.* CLARA CHRISTENSEN *et al.* Defendants in Error.

*Opinion filed October 16, 1914.*

1. **STATUTE OF FRAUDS**—*what is necessary to take oral contract out of the Statute of Frauds.* To take an oral contract relating to land out of the Statute of Frauds by part performance the contract and its terms must be established by clear and unequivocal evidence, and the acts relied upon as part performance must have been done under the contract itself and for the sole purpose of performing it.

2. **SAME**—*acts of part performance must refer exclusively to the contract.* Acts of part performance relied upon to take an oral contract relating to land out of the Statute of Frauds must refer exclusively to the contract, and be such as cannot be explained consistently with any other contract than the one alleged and such as would not have been performed but for the contract.

3. **SAME**—*possession must be taken under the contract.* To take an oral contract relating to land out of the Statute of Frauds possession must be taken under the contract, and it is not sufficient that the alleged vendee was previously in possession.

4. **TRUSTS**—*when no resulting trust exists in favor of husband.* No resulting trust in favor of the husband exists in land conveyed to his wife, where he neither paid anything nor became liable to pay anything on the purchase price.

WRIT OF ERROR to the Circuit Court of DeKalb county; the Hon. MAZZINI SLUSSER, Judge, presiding.

JONES & ROGERS, for plaintiff in error.

A. W. FISK, and H. W. McEWEN, for defendants in error.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

John Christensen, plaintiff in error, filed his bill in this case in the circuit court of DeKalb county against Clara Christensen, his wife, and Clara Kraus Sloan, defendants in error, alleging that he was the owner of a homestead estate, an estate for life and an undivided half of the fee of lot 8 in block 36, in the city of DeKalb, and praying the court to declare his title accordingly, to take an account of the rents and profits of his interest in the lot obtained by Clara Christensen since she excluded him from the premises, to require her to convey an undivided one-half of the premises to him, to decree to him a homestead estate therein and to require her to pay over to him the rents and profits so received by her. The defendant Clara Kraus Sloan was the owner of a mortgage executed by both Clara Christensen and John Christensen, and its validity was not disputed. The court heard the cause on exceptions to the report of a special master, who recommended that the bill be dismissed for want of equity. The exceptions were overruled and the amended bill dismissed.

The evidence in the case was to the following effect: On May 9, 1884, Maria Spicer, owner of the lot, and Robert Spicer, her husband, entered into a contract with William Thackham by which they agreed to convey the lot in fee simple, by warranty deed, for a consideration of \$200, payable by William Thackham as therein specified. Possession was taken by virtue of the contract, and Amelia Thackham, mother of William Thackham, resided on the lot with her children in a small one-story house containing three rooms. On October 3, 1885, the complainant, John Christensen, married Amelia Thackham and went to live



with her in the house on the premises. On September 4, 1886, Maria Spicer (then Maria Brady) and James Brady (who was then her husband) conveyed the lot to William Thackham in pursuance of the articles of agreement. There was a controversy as to whether there was a subsequent contract between William Thackham and the complainant. According to the testimony of the complainant he entered into an arrangement with William Thackham a year or two after the marriage and while he was living on the premises with his wife, by which it was agreed that if the complainant would put a house upon the premises he should have the life use of them. It was agreed that William Thackham, if present at the hearing, would testify that no such agreement was made. If the agreement was made it was several years afterward, before any building was placed on the premises by the complainant or anything was done under the contract. In 1892 or 1893 the complainant sold the old one-story house for a trifling sum and purchased an unfinished story-and-a-half building and moved it onto the lot. He finished the house sufficiently to make it habitable and claimed that he had expended \$1200 or \$1300 in improving the premises. William Thackham mortgaged the premises to Joseph Glidden for \$50 and the complainant paid that mortgage. Including that payment he proved expenditures by him amounting to \$720.50, but these improvements were made as much as six years after the alleged agreement with William Thackham, during which time the complainant was living on the premises with his wife. He continued to occupy the premises with his wife until July 2, 1898, when she died, and he continued to live there until February, 1903. After the death of his wife he had possession, and he married the defendant Clara Christensen on October 30, 1899, and they lived on the premises from that time until she drove him away. The complainant had assumed to be the owner of the premises and never paid any rent, and William Thack-

ham, who held the legal title, never made any demands upon him. In 1902 the defendant Clara Christensen learned that the legal title was in William Thackham, and there were negotiations for a purchase from him. He proposed to make a deed for \$800, and the complainant testified that the deed was to be made to him and his wife, Clara Christensen, and each was to be the owner of an undivided one-half. Neither of them had any means to pay for the property, and the money was borrowed from Clara Kraus Sloan, a daughter of Clara Christensen born during one of her former marriages. William Thackham, with his wife, conveyed the premises to Clara Christensen on October 23, 1902, and John Christensen and Clara Christensen executed their mortgage to Clara Kraus Sloan to secure a note signed by Clara Christensen alone, for \$800 and interest. On February 3, 1903, Clara Christensen filed her bill against John Christensen for a divorce and obtained an injunction restraining him from interfering in any way with the property. The bill was afterward dismissed, on motion of Clara Christensen, without prejudice. She testified that there was no agreement for a conveyance to the parties jointly; that she had supposed he owned the property, and when she found he did not she bought it herself; that he said he was unable to pay anything, and, in fact, paid nothing, and that the whole purchase money was borrowed from her daughter on the mortgage. Clara Christensen improved the property and rented it for saloon purposes for \$55 a month for one year, and after that for from \$35 to \$50 a month.

The contracts which complainant claimed were made between him and William Thackham and the defendant Clara Christensen were both oral, and if they were, in fact, made as claimed, they were subject to the defense of the Statute of Frauds unless facts were proved which would take them out of the operation of the statute. Such a contract may be taken out of the Statute of Frauds by

such part performance as would make it a fraud to permit the defense to be interposed against the obligation assumed, but there are certain conditions which the courts have always insisted must exist and be proved. One is, that the contract and its terms must be established by clear and unequivocal evidence. In *Langston v. Bates*, 84 Ill. 524, the court quoted from Story, (vol. 2, sec. 764,) as follows: "A court of equity ought not to act upon conjectures, and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn, written contracts." That rule has been repeated in numerous cases, among which are *Morrison v. Herrick*, 130 Ill. 631, *Standard v. Standard*, 223 id. 255, and *Casstevens v. Casstevens*, 227 id. 547. Another rule is, that the acts relied on as part performance must have been done under the contract itself and for the sole purpose of performing it, and it is a well established rule that possession must be taken under the contract and lasting and valuable improvements be made by the vendee. The acts of part performance must refer exclusively to the contract, and be such as cannot be explained consistently with any other contract than the one alleged and be such as would not have been performed but for the contract. (*Wood v. Thornly*, 58 Ill. 464; *Shovers v. Warrick*, 152 id. 355.) As possession must be taken under the contract it is not sufficient that the party was previously in possession, but it must affirmatively appear that he got possession under the agreement relied on and in part performance of the same. There was evidence that the property was worth much more than the \$800 which William Thackham asked for a deed, and the complainant had expended a considerable sum on the lot in comparison with its former value. William Thackham had permitted the complainant to occupy the premises without any payment of rent for a con-

siderable period after the death of the first wife, and the evidence justifies the conclusion that he intended to do so as long as he owned the premises, during the lifetime of the complainant. If we assume that the agreement with William Thackham was made as claimed, there was no proof that possession was taken under or in pursuance of the contract, so that the contract was not taken out of the statute and cannot be enforced. The possession of the complainant was referable, not to such a contract but to the possession of the wife, Amelia, who had been in possession under the contract of purchase from Maria Spicer, and there was no change in possession until her death, many years after the contract was alleged to have been made. We must be governed by our conclusion as to whether there was any legal obligation to permit the complainant to occupy the premises during his lifetime, and under the rules of law the proof was not sufficient to show such an obligation.

The alleged contract with the defendant Clara Christensen was denied by her, and the entire purchase money was borrowed from her daughter, the defendant Clara Kraus Sloan, upon the individual note of Clara Christensen, secured by the mortgage. There was no evidence that complainant disclosed to his wife, when she bought the property, that he had or claimed to have any interest in the premises, and we do not regard the alleged contract as proved. As he neither paid anything nor became liable to pay anything on the purchase price there was no resulting trust, and we are satisfied with the conclusion of the circuit court.

The decree is affirmed.

*Decree affirmed.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. ETHEL MELVILLE, Plaintiff in Error.

*Opinion filed October 16, 1914.*

1. STATUTES—*the doctrine of ejusdem generis.* Where general words follow particular and specific words in a statute the general words must be construed to include only things of the same kind as those indicated by the particular and specific words, unless there is something in the statute to show that such rule should not be applied.

2. DELINQUENT CHILDREN—*the act of 1905 applies only to one standing in loco parentis to delinquent child.* Before a person can be punished for contributing to the delinquency of a child under the act of 1905 (Laws of 1905, p. 189,) the information must allege that such person stood *in loco parentis* to the delinquent child, as the words, "any other person," used in the act, are limited by the preceding specific words, "any parent or parents, or legal guardian or person having the custody of any dependent, neglected or delinquent child."

CARTER, J., dissenting.

WRIT OF ERROR to the Branch "B" Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding.

JOSEPH N. DALY, for plaintiff in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, and EUGENE P. MORRIS, (EDWARD E. WILSON, of counsel,) for the People.

Mr. JUSTICE COOKE delivered the opinion of the court:

Plaintiff in error was convicted in the municipal court of Chicago of contributing to the delinquency of a female child, and the judgment of the municipal court has been affirmed by the Appellate Court for the First District.

The information under which the conviction was had charged that plaintiff in error, on or about the 15th day

of June, 1913, at, etc., "did then and there contribute to the delinquency of one Anita White, a female of previous chaste life under age of sixteen years, by supplying her with clothing and persuading her to visit houses of ill-fame with one Clarence Jennings, and did knowingly do such acts that directly produced the conditions which rendered such child a delinquent child," in violation of the statute. The evidence was not preserved by bill of exceptions and is not before us. The grounds relied upon for reversal are all based upon alleged defects in the common law record, and it is only necessary to consider one of these alleged defects.

The statute upon which the information was based is as follows: "Any parent or parents, or legal guardian, or person having the custody of any dependent, neglected or delinquent child, as defined by the statutes of this State, or any other person who shall knowingly or willfully encourage, aid, cause, abet or connive at such state of dependency, neglect or delinquency, or shall knowingly or willfully do any act or acts that directly produce, promote or contribute to, the conditions which render such child a dependent, neglected or delinquent child as so defined, or who, having the custody of such child, shall, when able to do so, willfully neglect to do that which will directly tend to prevent such state of dependency, neglect or delinquency, or to remove the conditions which render such child either a neglected, dependent or delinquent child, as aforesaid, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than \$200, or by imprisonment in the county jail, house of correction, or workhouse, for not more than twelve months, or both by such fine and imprisonment: *Provided*, that instead of imposing the punishment hereinbefore provided, the court shall have the power to enter an order suspending sentence and releasing the defendant from custody, on probation, for the space of one year, upon his or her entering

into a recognizance, with or without sureties, in such sums as the court may direct. The condition of the recognizance shall be such that if the defendant shall make his or her personal appearance in court whenever ordered to do so within a year, and shall provide and care for such dependent, neglected or delinquent child in such manner as to prevent a continuance or repetition of such state of dependency, neglect or delinquency, or as otherwise may be directed by the court, and shall further comply with the terms of such order, then the recognizance shall be void, otherwise of full force and effect. If the court be satisfied, by information and due proof under oath, that at any time during the year the defendant has violated the terms of such order, it may forthwith revoke such order and sentence him or her under the original conviction. Unless so sentenced, the defendant shall, at the end of such year, be discharged and such conviction shall become void." (Laws of 1905, p. 189.)

Plaintiff in error contends that this statute only applies to one standing *in loco parentis* to the dependent, neglected or delinquent child, and that an information which fails to charge such relationship is fatally defective. Defendant in error, on the other hand, contends that the statute is not limited to those standing *in loco parentis* to the dependent, neglected or delinquent child, but applies to any person who commits the acts prohibited by the statute. Defendant in error, in support of its position, relies entirely upon the words "or any other person," following the words, "any parent or parents, or legal guardian, or person having the custody of any dependent, neglected or delinquent child, as defined by the statutes of this State."

In *City of Chicago v. Ross*, 257 Ill. 76, we said: "It has been repeatedly held by this and other courts, that where general words follow particular and specific words in a statute the general words must be construed to include only things of the same kind as those indicated by the par-

ticular and specific words; (*Shirk v. People*, 121 Ill. 61; *Ambler v. Whipple*, 139 id. 311; *Cecil v. Green*, 161 id. 265; *Gundling v. City of Chicago*, 176 id. 340;) and this rule is enforced in the construction of a statute unless there is something in the statute or its context which shows that the doctrine of *ejusdem generis* should not be applied.—*In the matter of Swigert*, 119 Ill. 83; *Webber v. City of Chicago*, 148 id. 313; *City of Chicago v. M. & M. Hotel Co.* 248 id. 264; *Wiggins v. State*, 87 N. E. Rep. 718.”

There is nothing in the statute under consideration, or in its context, to show that the doctrine of *ejusdem generis* should not be applied, but, on the contrary, the provision that instead of imposing the punishment prescribed by the act the court shall have the power to suspend sentence and release the defendant from custody upon his or her entering into a recognizance conditioned, among other things, that the defendant “shall provide and care for such dependent, neglected or delinquent child in such manner as to prevent a continuance or repetition of such state of dependency, neglect or delinquency,” clearly shows that the doctrine of *ejusdem generis* should be applied, and that only one standing *in loco parentis* to the dependent, neglected or delinquent child can be guilty of violating this statute. As the information failed to allege any facts showing that plaintiff in error stood *in loco parentis* to the child named in the information, it failed to charge plaintiff in error with a violation of the statute and therefore cannot support the judgment entered against her. For this reason the judgment of the Appellate Court and the judgment of the municipal court are reversed.

*Judgment reversed.*

Mr. JUSTICE CARTER, dissenting.



JOHN E. WALL *et al.* Plaintiffs in Error, *vs.* RAY PFANSCHMIDT *et al.* Defendants in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 2, 1914.*

1. STATUTES—*when statute is not open to construction.* If the provisions of a statute are plain and unambiguous there is no room for construction, and the courts cannot read into it exceptions or limitations which depart from its plain meaning.

2. DESCENT—*fact that heir murders ancestor does not prevent his inheriting.* In Illinois the Statute of Descent in plain and unambiguous terms vests in the heir such estate as he is entitled to immediately upon the death of the intestate from whom the inheritance comes, and the fact that the heir is criminally responsible for the death of the intestate does not deprive him of his inheritance nor limit the same to a naked trust for the benefit of other persons.

WRIT OF ERROR to the Circuit Court of Adams county; the Hon. ALBERT AKERS, Judge, presiding.

JOHN E. WALL, *pro se.*

CARL E. EPLER, and GEORGE H. WILSON, for plaintiffs in error.

GOVERT & LANCASTER, for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiffs in error filed a bill for the partition of certain real estate, in the circuit court of Adams county, to the June term, 1913. A demurrer thereto was sustained, and the bill, which had been amended, was dismissed for want of equity. Plaintiffs in error elected to abide by their bill as amended and the cause was dismissed at their costs. A writ of error was sued out to review that decree.

The amended bill averred that certain real estate was devised under the will of Christian Abel to his daughter, Matilda, for her natural life and at her death to her children; that said Matilda intermarried with one Charles A. Pfanschmidt and to them were born two children, Ray and

Blanche; that said Charles A. owned certain real estate adjoining that devised to his wife, Matilda, all of which the family occupied as a farm, residing on that portion devised to the wife; that on or about September 27, 1912, Ray Pfanschmidt, one of said children, murdered his father, mother and sister and Emma Kaempfen, a school teacher boarding with them, setting fire to the residence and partly burning the remains of said four persons so killed, and that the order of their respective deaths could not be determined; that said Ray Pfanschmidt had been indicted in the circuit court of Adams county for the murder of said four persons and pleaded not guilty; that under the indictment for the murder of his sister said Ray Pfanschmidt was tried and found guilty and his punishment fixed by verdict of the jury at death, and that said criminal cause, at the time of this hearing in the court below, was pending in the trial court on motion in arrest of judgment. The motion in arrest of judgment has since been overruled and the criminal cause brought to this court by writ of error, the judgment of the trial court being reversed and the cause remanded for a new trial. (*People v. Pfanschmidt*, 262 Ill. 411.) The amended bill in this cause further alleged that Ray Pfanschmidt could not acquire any estate, right or title in and to said real estate through his act of murder; that Charles A. Pfanschmidt died intestate, leaving him surviving his son, Ray Pfanschmidt, the bill naming as other heirs decedent's father, brother, sisters, and children of a deceased brother and sister, and also enumerating the heirs of Matilda Pfanschmidt. It is further alleged that Ray Pfanschmidt executed his promissory note to Fred Pfanschmidt, his uncle, for \$4000, secured by mortgage on the real estate described in the bill, and another promissory note for \$4000 to George W. Govert and W. Emery Lancaster, secured by a second mortgage on said real estate; that Charles C. Pfanschmidt, the father of Charles A., quit-claimed to John E. Wall all his interest in said real estate,

and said Wall and his wife quit-claimed to E. W. C. Kaempfen an undivided two-thirds of said real estate. It is further alleged that said mortgages are null and void except as to the real estate devised to said Ray Pfanschmidt by the will of his grandfather, Christian Abel. The prayer of the bill is for partition, and that the court declare that said Ray Pfanschmidt did not take or acquire any interest in the real estate of Charles A. Pfanschmidt, his father, Matilda Pfanschmidt, his mother, or Blanche Pfanschmidt, his sister, upon their death, because he caused their death for the purpose of inheriting; that he took no other interest than that devised to him in his grandfather's will. The bill further prayed that he be enjoined from conveying, mortgaging or otherwise encumbering said real estate, and if it should be deemed that he took the naked legal title, by descent, to any part of said real estate, that it be deemed that he was holding said legal title not for his own use and benefit but only as trustee for such parties equitably entitled thereto, and that partition of the equitable interests be made accordingly.

Both parties agree that the law is that when two or more persons perish in a common disaster there is no presumption, under the common law, of survivorship; that if survivorship is claimed it must be proved; (*Middeke v. Balder*, 198 Ill. 590; *Young Women's Christian Home v. French*, 187 U. S. 401; 1 Greenleaf on Evidence,—16th ed.—secs. 29, 30;) and that this rule would apply whether the common disaster was a wreck or accident on land or sea or the murder of several persons at practically the same time, as alleged in this case.

Plaintiffs in error concede that defendant in error Ray Pfanschmidt retained and did not forfeit his estate in the remainder devised to him under the will of his grandfather, Christian Abel. The sole question in dispute is whether he could acquire an interest, by inheritance, in the real estate owned by his father, mother and sister, who under the

pleadings in this cause met their death by his acts intentionally committed.

Our statute on descent provides "that estates, both real and personal, of residents and non-resident proprietors in this State dying intestate, \* \* \* shall descend to and be distributed in manner following, to-wit: First, to his or her children and their descendants, in equal parts; \* \* \* second, when there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, \* \* \* and if there is no parent living, then to the brothers and sisters of the intestate, and their descendants." (Hurd's Stat. 1913, p. 907.)

This statute has never been construed by the courts of this State as to the question here involved. Counsel for plaintiffs in error admit that under the literal wording of the statute Ray Pfanschmidt would inherit, but their argument is to the effect that in construing this as well as all other statutes the maxims of the common law must be applied, and that according to those maxims no one can be permitted to take advantage of his own fraud or wrong or acquire property by his own crime; that it must be assumed that the legislature, in passing the Statute of Descent, had these maxims in mind and that the statute should be construed according to such legislative intent; that so construed Ray Pfanschmidt acquired no interest in the estate of his father, mother or sister.

The authorities on this question in other jurisdictions are not in harmony. The courts of Great Britain do not seem to have been called upon to pass upon it until in very recent years, doubtless because of the ancient common law doctrine of attainder and corruption of blood. Under the civil law one could not take property by inheritance or will from an ancestor or testator whom he had murdered, but such deprivation plainly was intended in the nature of a punishment, as the property, in such case, escheated to the exchequer. (Domat's Civil Law, part 2, book 1, title 1,

sec. 3; *Riggs v. Palmer*, 115 N. Y. 506.) In most States the statutes of descent are based upon the rules of the civil law, (14 Cyc. 23,) but each State has its own rules. (3-5 Greenleaf's *Cruise on Real Prop.*—2d Am. ed.—146, note.) The English common law of descents had its foundation in principles of feudal policy. (Reeve on Descents, 1.) Forfeiture of lands for felony was a doctrine of the old Saxon law, as a part of the punishment for the offense. The law of feudal escheat was brought into England at the conquest and superadded to the ancient law of forfeiture. (Sharswood's *Blackstone's Com.* vol. 1, book 2, p. 251.) Corruption of blood and forfeiture of lands in ordinary felonies were abolished by 54 Geo. III, chap. 45. (1 Chitty's *Crim. Law*, 735.) Later, in 1870, by statute of 33 and 34 Victoria, chapter 23, the entire doctrine of attainder, forfeiture and corruption of blood was abolished, except forfeiture consequent upon outlawry. (1 Jarman on Wills,—Bige-low's 6th ed.—\*45, 46; 6 *Ency. of Laws of Eng.* 210; *Avery v. Everett*, 1 L. R. A. 264.) In recent years the English courts, both in Great Britain and in some of the colonies, have passed on this question.

Before the passage of the Forfeiture act of 1870, in *Amicable Society v. Bolland*, 4 Bligh's New Reps. 194, (1830,) it was held that the parties representing and claiming under one convicted (and executed) of a capital felony (forgery) could not recover insurance. The decision was on grounds of public policy. In *Cleaver v. Mutual Reserve Fund Life Ass'n*, 1 Q. B. 147, decided in 1892, it was held that Mrs. Maybrick, who was named as beneficiary in an insurance certificate of her husband, whom she was convicted of murdering, could not recover from the insurance company. The insurance money became a part of the estate of the insured as a resulting trust. The following British and colonial cases have been decided in harmony with the *Cleaver case*, all on the ground of public policy, following the maxim that one cannot take advantage of his

own wrong: *Lundy v. Lundy*, 24 Can. Sup. Ct. 650; *In re Cash*, 30 N. Z. L. 577; *Hall v. Knight & Baxter*, Eng. L. R. Ct. of App. 1 P. R. 1.

In this country the decisions in *Riggs v. Palmer*, *supra*, *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, *Ellerson v. Westcott*, 148 N. Y. 149, and *Perry v. Strawbridge*, 209 Mo. 621, are in harmony with the British and colonial cases above cited. On the other hand, it has been held that where there are explicit rules governing the descent of property by statute and there is nothing contained therein to justify exclusion, the one upon whom the law casts the property cannot, because of the murder by him of the ancestor or testator, be divested of it by the court. *Owens v. Owens*, 100 N. C. 240; *Deem v. Millikin*, 53 Ohio St. 668; *Shellenberger v. Ransom*, 41 Neb. 631; *Carpenter's Estate*, 170 Pa. St. 203; *DeGraffenreid v. Iowa Land and Trust Co.* 20 Okla. 687.

The first case in this country was that of *Owens v. Owens*, *supra*, decided in 1888. It was there held that a widow convicted as an accessory before the fact in her husband's murder and confined in the State prison therefor was entitled to her dower in his lands.

*Riggs v. Palmer*, *supra*, was decided in 1889. This was an action by the heirs-at-law of a testator against a beneficiary who had murdered the testator in order to obtain possession of the property given him by the will, to cancel the provisions for said beneficiary's benefit. The court decided that by reason of having committed said crime the beneficiary was not entitled to take under the will and that the property belonged to the heirs-at-law.

In *Deem v. Millikin*, 6 Ohio Cir. Ct. 357, (1892,) it was held that a son who murdered his mother for the purpose of procuring her property succeeded to the title to her real estate by virtue of the Statute of Descent in that State. This decision was affirmed in *Deem v. Millikin*, 53 Ohio St. 668.

*Shellenberger v. Ransom*, *supra*, which at the first hearing in the Supreme Court was decided in 1891, following the reasoning in *Riggs v. Palmer*, *supra*, was on rehearing decided to the contrary, and it was held that even though it was proved that a father murdered his daughter in order to possess himself of her estate, nevertheless he took the title under the laws of descent of that State.

In *Carpenter's Estate*, *supra*, (1895,) a son murdered his father to come immediately into possession of his estate. The son was convicted and hanged, and it was contended that because of his crime the title never vested in him. The court held that under the Statute of Descent in that State the title had vested in the son immediately upon his father's death.

*Ellerson v. Westcott*, *supra*, is cited by counsel for the plaintiffs in error, but the only holding in that case, which was a partition proceeding, was that the killing of the testator by a devisee for the purpose of realizing under the will did not render the devise void, and the court indicated that relief could be had against one committing the murder, in equity.

*McAllister v. Fair*, 72 Kan. 533, (1906,) was a proceeding begun in the probate court to obtain a distribution of the estate of one who had been murdered by her husband for the purpose of obtaining her property. The Kansas statute provided how property should descend, and contained no exception. The court held there was no justification for reading an exception into the statute which would preclude the husband from inheriting because of the crime he committed.

In *Wellner v. Eckstein*, 105 Minn. 444, decided in 1908, the wife murdered her husband for the purpose of acquiring his real estate. The court was not agreed as to whether a murderer could inherit under the Statute of Descent in that State, and the case was decided on other grounds.

In *Perry v. Strawbridge*, *supra*, (1908,) in a petition for partition, it was held that a man who murdered his wife to inherit half of her estate under the statute took no title by reason of his crime. There was no reference in the statute which indicated an exception.

In *DeGraffenreid v. Iowa Land and Trust Co.* *supra*, (1908,) it was held that a person was not prevented from inheriting the property of one he murdered where it did not appear the murder was committed for that purpose, there being nothing in the statute to justify the exclusion. See, also, as somewhat analogous to this case, *New York Mutual Life Ins. Co. v. Armstrong*, *supra*, *Schmidt v. Northern Life Ass'n*, 112 Iowa, 41, *Kuhn v. Kuhn*, 2 Ann. Cas. (Iowa,) 657, and *In re Merte's Estate*, 104 N. E. Rep. (Ind.) 753.

In some jurisdictions, as in New York, the conclusion has been reached that while the murderer takes a legal title which is unimpeachable in a court of law, a court of equity will deprive him of the use of the property by enjoining the enforcement of the legal right. In other jurisdictions it has been held that when the statutes make explicit provision for the descent of an intestate's property and specify the causes for which a will may be annulled or set aside, and neither the statute on descent nor on wills includes the case of a murder committed by an heir or devisee in order to obtain the property, the legal title which passes to the murderer under the Statute of Descent or by will is indefeasible. 21 Am. & Eng. Ency. of Law, (2d ed.) 238; 14 Cyc. 61.

While this question has never been passed upon by this court somewhat kindred questions have been decided. In *Holdom v. Ancient Order of United Workmen*, 159 Ill. 619, it was decided that the right of recovery by an insane beneficiary under a policy of life insurance was not forfeited by his killing the insured under such circumstances that the killing would be murder if the beneficiary were



sane. In *Supreme Lodge Knights and Ladies of Honor v. Menkhause*n, 209 Ill. 277, it was held that the murder of the insured by the beneficiary named in the benefit certificate precluded recovery of the insurance. In *Collins v. Metropolitan Life Ins. Co.* 232 Ill. 37, the insurance company disputed its liability for payment of insurance on the life of one convicted of murder and executed, on the ground that it was against public policy. There was no stipulation in the policy exempting the company and it was held liable for the policy on the murderer's life.

The rule of descent in this jurisdiction was first declared in the Ordinance of 1787, and the act of March 23, 1819, in force in 1822, was a literal transcript of the second section of said ordinance. (*Orthwein v. Thomas*, 127 Ill. 554.) The legislature of Illinois, at the same session at which it adopted the Statute of Descent, passed an act adopting the common law of England of a general nature and all British statutes of a general nature, with a few stated exceptions, made in aid of the common law, prior to the fourth year of James I. (Laws of 1819,—2d sess.—1; Hurd's Stat. 1913, p. 525.) This statute, however, provided specifically that only the common law of England of a general nature, so far as the same is applicable to our condition, shall be in force in this State. (*Penny v. Little*, 3 Scam. 301; *Lavalle v. Strobel*, 89 Ill. 370.) This being so, counsel argue that the same line of reasoning should be applied in construing this Statute of Descent as has been applied by this court in construing the statute as to the meaning of the word "children" in those cases wherein it has been held that the word "child" or "children" embraces only legitimate children, (*Blacklaws v. Milne*, 82 Ill. 505; *Orthwein v. Thomas*, *supra*;) and has also been applied in construing the statute as to the right of a non-resident alien to inherit. (*Wunderle v. Wunderle*, 144 Ill. 40; *Beavan v. Went*, 155 id. 592; *Meadowcroft v. Winnebago County*, 181 id. 504.) Those decisions are not decisive, as the

wording of the statute on the questions there involved practically required the conclusions reached. The rules of common law were only invoked as supporting that construction of the statute which, reading all its provisions together, was the reasonable construction.

In discussing the question here under consideration, Wharton on Homicide (3d ed. sec. 667,) states: "The broad theory has been asserted that all laws must be controlled, in general operation and effect, by the general fundamental maxim of the common law that no one shall be permitted to profit by his own wrong or found any claim upon his own iniquity or acquire property by his own crime, and the rule has been asserted that the statutes of descent and distribution are to be considered with reference to these principles, and that a murderer cannot be permitted to take thereunder, either as heir or legatee, the estate of one whom he has murdered for the purpose of obtaining his property. This rule, however, has been either rejected or limited and confined in its application, and the prevailing, if not the universal, rule would appear to be, that where a statute of descent and distribution, or provision for succession, is plain and unambiguous in its terms there is no room for construction or interpretation, and it operates solely within its own terms and vests in the heir such estate as he is entitled to immediately upon the death of the intestate from whom the inheritance comes, without reference to any question of criminal responsibility of the heir for the death of the intestate or devisor. This rule finds its inception in the theory that the public policy of a State is the law of that State as found in its constitution, its statutory enactments and its judicial records; and where the intestate law casts the estate of a deceased person upon designated persons this is absolute and peremptory, and no rule of public policy can take it from the persons designated by statute and give it to others, even for the reason that the

designated person killed the intestate, without a violation of the statute."

If in a statute there is neither ambiguity nor room for construction the intention of the legislature must be held free from doubt. The question as to what the framers of the statute would have done had it been in their minds that a case like the one here under consideration would arise is not the point in dispute. The inquiry is as to what, in fact, they did enact, possibly without anticipating the existence of such facts. This should be determined, not by conjecture as to their meaning, but by the construction of the language used. (*Shellenberger v. Ransom, supra.*) "Where there is no ambiguity in the words there is no reason for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of the words,—especially in a penal act,—in search of an intention which the words themselves did not suggest." (Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat. 76.) The Statute of Descent does not in any way, directly or indirectly, recognize this question. The wrong to be obviated and the remedy for it will guide the court in finding the intention of the legislature, but this rule of law offers no authority for adding an important exception or limitation to a statute which in clear language states a rule of public policy. (*Deem v. Millikin, supra.*) Knowledge of the principles of statutory interpretation must be imputed to the legislature. In plain language our Statute of Descent designates the persons who shall succeed to the estates of deceased intestates. That statute provides that in cases like this the son and brother shall take the estate. By what authority can this court say that although there is a son and brother he shall not take, but that relatives who under the wording of the statute have no right to these estates shall take? It is impossible for the court to designate different persons to take such estate without a violation of the law. Under the rules for the interpretation

of statutes the courts cannot read into a statute exceptions or limitations which depart from its plain meaning. (*In re Carpenter's Estate*, *supra*.) If there were any ambiguity in this statute or if it were the province of the court to settle this question with respect to the descent of property, then the argument of counsel for plaintiffs in error would have weight. When the legislature has spoken in clear and unequivocal language the courts are bound thereby. (*McAllister v. Fair*, *supra*.) This court has held that the rules of the common law as to descent and devise have been wholly superseded by our statutes on those subjects. (*Kochersperger v. Drake*, 167 Ill. 122; *Collins v. Metropolitan Life Ins. Co.* *supra*; *North v. Graham*, 235 Ill. 178; *In re Mulford*, 217 id. 242.) In the *Collins* case, *supra*, while that case did not deal with the exact question here in point, this court quoted with approval the rules as to the proper construction of statutes on descent laid down in *Shellenberger v. Ransom*, *supra*, *Owens v. Owens*, *supra*, *Deem v. Millikin*, *supra*, and *In re Carpenter's Estate*, *supra*. To construe this statute as contended by counsel for plaintiffs in error in this case would in practical effect overrule the reasoning in the cases just referred to. The courts have no concern with the wisdom of a statute unless it contravenes some constitutional provision.

Plaintiffs in error argue that the holdings of the courts heretofore cited, construing statutes similar to ours, are without force in this State because many of them are code States, where, they argue, the common law is not in force. Kansas adopted the common law of England by statute declaring that "the common law, as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the general statutes of this State." (Gen. Stats. of Kan. 1909, sec. 9850.) Nebraska has a similar statute. By the decisions of the courts of Ohio and Pennsylvania the same rule has been laid down.

Counsel for plaintiffs in error further contend that if defendant in error obtained the title under the Statute of Descent, only the naked legal title passed to him; that he cannot hold it for his own benefit but only as a trustee *ex maleficio* and in trust for the heirs equitably entitled thereto, as held by the Court of Appeals of New York, (*Riggs v. Palmer, supra*,) basing the argument on like principles to those under which devises or bequests procured by fraud have been held constructive trusts, and applied, in equity, to the benefit of the persons equitably entitled thereto. 3 Pomeroy's Eq. Jur. sec. 1054; *Larmon v. Knight*, 140 Ill. 232; 2 Tiffany on Real Prop. sec. 505a.

Counsel argue that even though the grounds of public policy would not justify the construction of the Statute of Descent as contended for by them, public policy will forbid such a construction or enforcement of the statute as will encourage crime or give a reward for its performance. This doctrine was practically invoked in *Knights of Honor v. Menkhausem, supra*, but there it was as to the construction of a contract and not of a statute. This court has repeatedly held, in line with the general rule in other jurisdictions, that the public policy of a State must be sought in its constitution, legislative enactments and judicial decisions. (*Zeigler v. Illinois Trust and Savings Bank*, 245 Ill. 180.) In *Collins v. Metropolitan Life Ins. Co. supra*, we said (p. 44): "When the sovereign power of the State has by written constitution declared the public policy of the State on a particular subject, the legislative and judicial departments of the government must accept such declaration as final. When the legislature has declared, by law, the public policy of the State the judicial department must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to and not the judiciary, whose function is to declare the law but not to make it. Limiting their actions to questions left open by the constitution and the statutes, courts may, no

doubt, apply the principles of the common law to the requirements of the social, moral and material conditions of the people of the State and declare what rule of public policy seems best adapted to promote the peace, good order and general welfare of the community; hence arises the rule that the decisions of its courts are to be investigated in determining the public policy of any government." Statutes of descent and devise are declarations of public policy of this State on this subject. To hold Ray Pfanschmidt obtained the naked legal title but only held it as trustee, as contended by counsel for plaintiffs in error, would be to hold that by his crime he forfeited the right to inherit. Section 11 of article 2 of the constitution of 1870 provides: "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate." The Criminal Code, in fixing the punishment for murder, states: "Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years." (Hurd's Stat. 1913, p. 835.) It does not state that the guilty person shall forfeit his right to inherit. In *Collins v. Metropolitan Life Ins. Co. supra*, it was said (p. 42): These provisions are "clear and unequivocal declarations of the public policy of this State to the effect that no forfeiture of property rights shall follow conviction for crime." Public policy does not demand this forfeiture, for the demands of public policy are satisfied by the proper execution of laws and the punishment of crime. If other punishment be required, the duty to so provide rests upon the legislative branch of the government. Whether this accords with natural right and justice is not for the courts to decide. The laws of descent do not depend upon the ideas of court or counsel as to justice or natural right but depend entirely upon the provisions of the statute. (*In re Kirby's Estate*, 121 Pac. Rep. 370.) "The line between legislation and interpretation is clear, and for the

courts to declare a forfeiture for crime where the legislature has remained silent is legislation by judicial tribunals,—a subject with which they have no concern.” *Holdom v. Ancient Order United Workmen, supra.*

The decree of the circuit court must be affirmed.

*Decree affirmed.*

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THE GOLCONDA NORTHERN RAILWAY, Appellant, vs. THE  
GULF LINES CONNECTING RAILROAD OF ILLINOIS, Ap-  
pellee.

*Opinion filed October 16, 1914—Rehearing denied Dec. 2, 1914.*

1. RAILROADS—*rule as to prior right to appropriation of land for railroad purposes.* As between two railroad companies the prior right to the appropriation of land for railroad purposes belongs to the company which first locates its line, and the first location belongs to the company which first defines and marks its route and adopts the same for its permanent location by authoritative action.

2. SAME—*location of line of railroad is the act of the company through its directors.* The location of the line of a railroad is the act of the company and can be made only by the board of directors, but the statute does not require the action of the board of directors to be in any particular form nor proved in any particular way.

3. SAME—*how location of line of railroad may be proved.* The location of a railroad is the selection and adoption of the particular line upon which the railroad is to be constructed, and may be proved by such acts of the officers and agents of the company, and other facts, as show that such line has been selected with the approval of the board of directors, and such approval may be shown by the circumstances of the case.

4. SAME—*recording of proper plat is prima facie evidence of location of railroad.* The filing of a plat in the recorder's office, showing the location of a railroad through the county, which plat is filed by the president of the railroad company and certified, under oath, by the president as a true map of the company's adopted, located line through the county, is *prima facie* evidence of the location of the road.

5. SAME—*non-compliance with condition subsequent in right of way deed does not determine estate.* Non-compliance by a railroad company with a condition subsequent in a right of way deed does not determine the estate, but such breach can only be taken

advantage of by the grantor, his heirs or his devisees, and there must be an entry after the breach, or some act equivalent thereto, in order to re-vest the estate in the grantor.

6. *SAME*—*third person cannot raise question of railroad company's power to sell its road.* Railroad corporations have power, under certain circumstances, to make sales and conveyances of real and personal property, and the question whether the company has exceeded its power in selling its located line, right of way, franchise and other property cannot be raised by another railroad company for the purpose of taking the right of way from the purchaser, as such question can be raised only by the State in a proper proceeding.

7. *SAME*—*what is not an abandonment of right of way.* The fact that a railroad company, finding itself unable to build its railroad within ten years from the filing of its articles of association, sells and conveys its located line, right of way and property to another railroad company does not amount to an abandonment of its right of way so long as the grantor or its grantee occupies it for railroad purposes, and such transfer gives no right to a third railroad company to appropriate such right of way and enjoin the grantee from using the same.

APPEAL from the Circuit Court of Pope county; the Hon. W. W. DUNCAN, Judge, presiding.

This case is a controversy between two railroad companies about the possession of a parcel of ground and the right to occupy it for the construction and operation of a railroad thereon. The ground is a narrow pass north of Golconda, in Pope county, which extends along the Ohio river between the river on one side and high rocky bluffs on the other. Each company claims the exclusive right to build a railroad through this pass, and on February 6, 1913, the Golconda Northern Railway, claiming to be in possession of the pass engaged in the construction of its railroad, filed a bill against the Gulf Lines Connecting Railroad of Illinois for an injunction to restrain the latter from interfering with, obstructing or hindering the former in the construction of its railroad through the pass. A preliminary injunction was allowed, an answer was filed, a motion to dissolve the injunction was overruled, and after a hear-



ing upon the pleadings and evidence the injunction granted was dissolved, the bill was dismissed for want of equity and a writ of restitution was awarded to the defendant, restoring it to the same possession of the premises as it had when the original bill was filed, so as to leave both parties in the same position as to the possession of the premises as they were when the suit was begun. The complainant appealed, and by agreement of the parties an order was made for the preservation of the premises in the same condition until the final determination of the appeal.

The Toledo, St. Louis and New Orleans Railroad Company, to whose rights the appellee claims to have succeeded, was incorporated on March 18, 1902, for the purpose of building a railroad from a point in Shelby county to a point on the Ohio river in Massac county, near Brookport. On July 23, 1909, it filed in the recorder's office of Pope county a map of its adopted, located lines through that county. Besides making a survey and marking this location it had procured many deeds for the right of way, including conveyances from the owners of all the lands within the pass in controversy. During the summer of 1909 it cleared its right of way through the pass, to its full extent, of the heavy timber with which it was covered. This company did not complete the construction of any part of its railroad, and being unable to finish and put it in operation within ten years from the filing of its articles of association, as required by the Railroad Corporation act, on March 5, 1912, it executed two deeds purporting to convey all of its property, real and personal, including the right of way over the pass in question, to the appellee, the Gulf Lines Connecting Railroad of Illinois, which had been incorporated on January 22, 1912, for the purpose of building a railroad from a point in Vermilion county to a point on the Ohio river near Brookport. Immediately after the execution of these conveyances the appellee employed surveyors, who went upon the right of way, including the prem-

ises in question, and ascertained the old lines, finding most of the old stakes,—enough to follow the entire line and identify it. The right of way which had been cleared, though overgrown with four years' growth of timber and underbrush, was well defined. A detailed report of the character and cost of construction was made by the engineer and a contract was entered into for the construction work. On Monday, November 25, 1912, the appellee's engineer, with a party of assistants, was engaged in surveying, beginning at the north end of the pass, re-tracing the old lines, cross-sectioning and setting grade stakes for the construction force to go to work grading. This work continued throughout the week. On Friday night, November 29, the construction outfit, having been brought from Metropolis by boat, was unloaded on the premises in controversy, and from that time until the filing of the bill the work of grading and construction through the pass was actively prosecuted by the contractors.

The appellant was organized as a corporation on March 13, 1909, for the purpose of building a railroad from Golconda to a point on the Ohio river near Elizabethtown, in Hardin county. It surveyed and located its line through the pass in controversy, procured a part of the right of way, and in August, 1912, began the work of construction about a mile from the river north of the north end of the pass. About the first of October the appellant's construction force reached the river, and in November had arrived at the north end of the pass and was working there with teams. Between November 20 and 25 the appellant's engineer began surveying through the pass from the north and met the appellee's engineer engaged in the same work. On November 26 the appellant began to fence in the whole pass by attaching two wires to posts and trees along each side of the right of way, and by Saturday, November 30, completed this fencing. Guards were posted, and notices forbidding trespassing, signed by the appellant's president,

were put up. The appellee's surveyors were at work on the right of way during all of the time the appellant was stringing these wires around them. No attention was paid to the fencing or the notices, and during December, January and February each company had a force of men at work in the disputed territory, grading and laying ties and rails, and each interfered with the work of the other, throwing off the ties and rails and tearing down the grades of the other where they obstructed the work of the respective parties.

JAMES C. COURTNEY, and ROY R. HELM, (H. A. EVANS, GEORGE B. BAKER, and D. W. HELM, of counsel,) for appellant.

CHARLES DURFEE, JOHN W. BROWNING, C. L. V. MULKEY, and WHITNEL & BROWNING, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

Counsel for the appellant advance three propositions as the basis of their claim that the decree should be reversed, viz.: First, that the appellant was in possession of the pass and the appellee entered upon and invaded its possession; second, that the appellant made the first location of its lines through the pass; and third, that it has the better title. We do not agree with any one of these propositions.

*First*, as to the possession. Prior to November 25 the appellant had been working on its grade north of the pass and had done some construction work down to the entrance of the pass at the north end, and possibly a little work within the pass at that end. Phelps' land was at the north end of the pass, and no attempt had been made to make a survey in the pass south of that land. At that time the appellant's engineer started in to survey south from the Phelps land and immediately met the surveying party of the appellee, which was engaged in cross-sectioning and

setting grade stakes on the line which had previously been surveyed and marked. The next day the president of the appellant, having been advised by his attorney that if he could get the right of way fenced before the appellee's construction outfit got there the attorney believed he could hold the right of way for the appellant, started a force of men to string two wires around the right of way. During the week the right of way was thus enclosed, the two forces of engineers of the appellant and the appellee all the time continuing their work on the land thus enclosed. This is all the work that appears to have been done by the appellant on the premises up to that time. It had no actual possession of any part of the premises, unless it was of a small part of the north end of the pass. It had not attempted elsewhere to exercise any dominion over the pass. The appellee, after the execution of the deeds to it on March 5, 1912, went upon the premises and made an examination of the line, preparing for the construction of the road, taking the grading cuts and fills, and making estimates for the construction. It actually did enter into a construction contract, and the appellant had learned that the construction company was coming with its outfit and for that reason undertook the fencing of the right of way. It is clear that the appellant had no prior or exclusive possession of the pass on November 29, when it is claimed the tortious entry was made by the appellee. It did not afterwards acquire possession, except of such parts as it was actually engaged in working on. The most that could be claimed for it was a joint occupation with the appellee in a contest for the possession. The evidence does not sustain the essential allegation of the appellant's bill that it was in the actual possession of the premises in controversy.

*Second*, the location. As between two railroad companies, the prior right to the appropriation of land for railroad purposes belongs to the company which first locates its line, and the first location belongs to that company which

first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. (*Fayetteville Street Railway Co. v. Aberdeen and Rockfish Railroad Co.* 142 N. C. 423; *Williamsport and North Branch Railroad Co. v. Philadelphia and Erie Railroad Co.* 141 Pa. 407; *Chesapeake and Ohio Railroad Co. v. Deepwater Railway Co.* 57 W. Va. 641.) The location of the line of a railroad is the act of the company and can be made only by the board of directors. (*Black v. Chicago, Burlington and Quincy Railroad Co.* 243 Ill. 534; *East St. Louis, Columbia and Waterloo Railway Co. v. Illinois State Trust Co.* 248 id. 559.) It appears in the record that the appellant's board of directors, at a meeting held on December 6, 1909, adopted the location shown by its survey and map recorded in September, 1909. It is insisted that there is no evidence of a location made by the appellee. No record of any action taken by the board of directors of the appellee was shown and it is not claimed that any formal action locating its line was taken by them, but the appellee relies upon proof of a location made by its predecessor in title, the Toledo, St. Louis and New Orleans Railroad Company. Section 9 of chapter 109 of the Revised Statutes requires every railroad company to cause a plat of the location of its railroad to be made and recorded in the office of the recorder of deeds of the county in which the premises, or any part of them, are situated, within six months after said railroad is located. Such a plat was filed in the recorder's office of Pope county by the president of the Toledo, St. Louis and New Orleans Railroad Company. It was certified, under oath, by the president as a true map of the company's adopted, located line through Pope county, and we regard it as *prima facie* evidence, at least, of the location of the road. The company, through its agents and employees, was engaged, before and after the plat was filed, in obtaining deeds for the right of way on this line and they cleared off the timber along the line. It

does not appear whether the board of directors had ever voted for and adopted a formal resolution directing the location of the road on this line, but all the work done by the company consisted in procuring the right of way and doing work preliminary to construction along the line shown by the map attested by the president of the company. The statute does not require the actions of the board of directors in the location of a railroad to be in any particular form or proved in any particular way. The location is the selection and adoption of the particular line upon which the railroad is to be constructed, and may be proved by such acts of the officers and agents of the company and other facts as show that such line has been selected with the approval of the directors, and such approval may be shown by the circumstances of the case. The location indicated by the map of the Toledo, St. Louis and New Orleans Railroad Company was earlier in time than that of the appellant, but the appellant insists that the appellee is not entitled to the benefit of this location, and the question raised by this objection will be considered under the next head.

*Third*, the title. The Toledo, St. Louis and New Orleans Railroad Company, prior to the organization of the appellant, obtained from the owners deeds for the right of way over all the lands in the pass. Some of these deeds were subject to a condition subsequent for the building of the railroad by December 1, 1904. New deeds were later executed in place of these, in which the date of building was December 1, 1909. No entry was ever made by any of the grantors or their heirs for failure to comply with this condition and no attempt was ever made to declare a forfeiture. Some of the deeds were conveyances in fee simple. The deeds of March 5, 1912, from the Toledo, St. Louis and New Orleans Railroad Company to the Gulf Lines Connecting Railroad of Illinois purported to convey the located line for a railroad beginning at station 3985 of

the location survey, situated on Main street, East Carmi, White county, Illinois, extending southerly through various counties, including Pope, to a point on the Ohio river near Brookport, in Massac county, including all rights of way and the lands conveyed to the grantor company in Pope county, including the land through the pass in controversy. This constitutes the appellee's title.

The appellant's title consists of the resolution of its board of directors locating its line, and deeds from the owners of the land through the pass in controversy, obtained subsequent to the deeds to the Toledo, St. Louis and New Orleans Railroad Company. The validity of this title depends upon the invalidity of the appellee's title, and the appellant insists that the latter is void because of the expiration of the time limited for the building of the road in some of the deeds to the Toledo, St. Louis and New Orleans Railroad Company, because that company made no location of its railroad, because the appellee has made no location of its railroad, because the Toledo, St. Louis and New Orleans Railroad Company had no power to convey its right of way, located line, franchises and all its property to the appellee and the deeds by which it purported to do so are void, and because the Toledo, St. Louis and New Orleans Railroad Company having failed to complete its railroad and put it in operation within ten years from its incorporation and having abandoned its intention to build a railroad, the property conveyed to it for that purpose reverted to the grantors and passed by their subsequent deeds to the appellant.

So far as the appellant's claim rests upon the failure of the grantee to comply with the condition subsequent for the building contained in some of the deeds it is of no force. A court of equity will not lend its aid to enforce a forfeiture because of a breach of a condition subsequent in a deed. (*Toledo, St. Louis and New Orleans Railroad Co. v. St. Louis and Ohio River Railroad Co.* 208 Ill.

623; *Douglas v. Union Mutual Life Ins. Co.* 127 id. 101; 2 Story's Eq. Jur. sec. 1319.) Moreover, a breach of a condition subsequent can be taken advantage of only by the grantor, his heirs or devisees. His grantees, whether before or after the breach, acquire no right to enforce a forfeiture. (*Waggoner v. Wabash Railroad Co.* 185 Ill. 154; *Boone v. Clark*, 129 id. 466; *Ruch v. City of Rock Island*, 97 U. S. 693; 2 Washburn on Real Prop.—6th ed.—secs. 954, 957.) Non-compliance with a condition subsequent does not, of itself, determine the estate. After breach, an entry, or some act equivalent thereto, is necessary to re-vest the estate in the grantor. *Mott v. Danville Seminary*, 129 Ill. 403; *Ruch v. City of Rock Island*, *supra*; 2 Washburn, *supra*.

We have held that the evidence justifies the conclusion that the Toledo, St. Louis and New Orleans Railroad Company had made a location of its road on July 23, 1909. The sale and conveyance of its located line, right of way, franchise and other property to the appellee, if valid, conveyed to the latter the prior right which the grantor had to construct a railroad on this located line. It is insisted, on behalf of the appellant, that the attempted conveyance to the appellee was contrary to public policy and beyond the power of the grantor, and was therefore void and of no effect whatever. A railroad corporation has not, as a general rule, the power to sell its road and franchise without statutory authority. The powers of all corporations are such, only, as are conferred by the statute under which they are organized, and a public service corporation cannot, without the assent of the State, sell or lease its entire property and franchise to another corporation and disable itself from performing the duties to the public imposed by its charter. (*Chicago Gas Light Co. v. People's Gas Light Co.* 121 Ill. 530; *Union Trust and Savings Bank v. Kinloch Telephone Co.* 258 id. 202; *Thomas v. West Jersey Railroad Co.* 101 U. S. 71; *Central Transportation Co. v.*



*Pullman's Palace Car Co.* 139 id. 24.) It would not, however, enable the appellant to maintain its bill even if we were to hold the deed of the Toledo, St. Louis and New Orleans Railroad Company to the appellee void. The only effect of such holding would be to leave the title in the former company, but it would not confer any right upon the appellant or give to it any title or enable the grantors of the Toledo, St. Louis and New Orleans Railroad Company to grant any title to the complainant. The fact that because of its failure to finish the road and put it in operation within ten years from the time of filing its articles of association section 26 of the Railroad and Warehouse act declares that the corporate existence and powers of that corporation should cease does not affect the question. The State, alone, could take advantage of the failure of the company in this regard, and until it did so no other person could question its existence or the validity of its corporate acts. *Ross v. Chicago, Burlington and Quincy Railroad Co.* 77 Ill. 127; *Chicago and Eastern Illinois Railroad Co. v. Wright*, 153 id. 307.

Admitting that the conveyance by the Toledo, St. Louis and New Orleans Railroad Company was beyond the corporate powers of that corporation, the law does not permit third persons having no interest in the corporation or its trust to dispute the validity of its conveyance. The *ultra vires* acts of the corporation may be objected to by the State, the corporation, its stockholders or creditors, or the persons with whom the *ultra vires* transactions are had, but not by third persons having no interest in the subject matter. Railroad corporations have power, under certain circumstances, to make sales and conveyances of real and personal property. Whether any particular conveyance is in excess of this power is a question which concerns only the corporation itself, the State, or those persons having some interest or title in the corporation or the property involved. Where a corporation has power to hold real estate un-

der any circumstances or for any purpose, its title cannot be questioned by any person except the State. (*Hough v. Cook County Land Co.* 73 Ill. 23; *Barnes v. Suddard*, 117 id. 237; *Hamsher v. Hamsher*, 132 id. 273; *Cooney v. Booth Packing Co.* 169 id. 370; *Ehrman v. Union Central Life Ins. Co.* 35 Ohio St. 324.) A national bank is prohibited from making loans on real estate security, but a mortgage given to such a bank to secure future advances is a valid security, which can be questioned only by the government. (*Genesee Nat. Bank v. Whitney*, 103 U. S. 99.) Only the sovereign can object to a conveyance to a corporation incompetent by its charter to take the title to real estate. It is valid until assailed in a direct proceeding instituted for that purpose. (*Fritts v. Palmer*, 132 U. S. 282; *Hickory Farm Oil Co. v. Buffalo, New York and Philadelphia Railroad Co.* 32 Fed. Rep. 22; *Bone v. Delaware and Hudson Canal Co.* 2 Sad. (Pa.) 55; *Chicago, Burlington and Quincy Railroad Co. v. Lewis*, 53 Iowa, 101; *Carlow v. Altman*, 28 Neb. 672.) Where the statute prohibited a corporation from owning over five thousand acres of land, the question whether a corporation owning a greater quantity of land exceeded its powers in purchasing an additional quantity is a question between the corporation and the State, only, and does not concern the vendors or others. (*American Mortgage Co. v. Tennille*, 87 Ga. 28.) These are cases in which the conveyance was made to the corporation and not by the corporation, but there is no difference, in principle, whether the excess of power is in purchasing or in selling. The corporation having the power in such cases to sell and convey property, the question whether it exceeded its power is for the State, only.

The appellant has no such interest as entitled it to enjoin the appellee from constructing a railroad in this pass. The only injury of which it can complain in a judicial tribunal is the invasion of some legal or equitable rights. It alleges that the appellee is acting beyond its authority

under the law because the conveyance under which it claims was beyond the charter power of its grantor to make. This conveyance, however, did not injuriously affect any right of the appellant, and it has, therefore, no ground to complain. Neither the Toledo, St. Louis and New Orleans Railroad Company nor the appellee owed any duty to the appellant in regard to this land or to the title thereto. A stockholder in the grantor company might have an interest in restraining it within the limits of its corporate powers and the State might have an interest in preventing the usurpation and perversion of its franchises, but the appellant has no interest in these questions and cannot raise them to enable it to seize the property which is the real subject matter of the controversy. *New Orleans, Mobile and Texas Railway Co. v. Ellerman*, 105 U. S. 166.

It is urged that by the abandonment of the right of way by the Toledo, St. Louis and New Orleans Railroad Company the property reverted to the original grantors of that company, and that they had the power to convey a good title to the appellant. There is no evidence of any intention to abandon the right of way. To constitute such an abandonment there must not only be non-user but an intention to abandon. (*Stannard v. Aurora, Elgin and Chicago Railroad Co.* 220 Ill. 469; *Durfee v. Peoria, Decatur and Evansville Railway Co.* 140 id. 435.) In the latter case the railway company took up the rails and ties over the place in controversy and failed to occupy it for nine or ten years but without an intention to abandon it, and it was held that there was no abandonment. Here the railroad company was unable to construct its railroad within ten years after filing its articles of association, but there is no evidence that it ever ceased its efforts to procure its construction or intended to do so. The sale of the right of way was not an abandonment, but was an attempt to secure the application of the right of way to railroad pur-

poses. It is immaterial that the particular corporation was unable to build the railroad. The right of way cannot be said to have been abandoned so long as the original grantee or its grantees are occupying it for railroad purposes. *Crolley v. Minneapolis and St. Louis Railway Co.* 30 Minn. 541; *Noll v. D., B. & M. Railroad Co.* 32 Iowa, 66; *Hatch v. Cincinnati and Indiana Railroad Co.* 18 Ohio St. 92; 1 Redfield on Railways, 221.

The decree of the circuit court dismissing the bill was right, and it is affirmed.

*Decree affirmed.*

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THE PEOPLE *ex rel.* Chicago Bar Association, Relator, *vs.*  
FREDERICK W. STORY, Respondent.

*Opinion filed October 16, 1914—Rehearing denied Dec. 2, 1914.*

1. DISBARMENT—*when improper conduct of an attorney cannot be disregarded.* An attorney who collects money for his client and refuses, without excuse, to pay it on demand is guilty of such a breach of professional duty as cannot be disregarded, and he is subject to discipline according to the circumstances of the case.

2. SAME—*what does not excuse failure to pay over money to client.* The fact that there may be a dispute between attorney and client as to the amount the attorney is entitled to retain as fees for collecting money does not excuse the attorney in refusing to pay over to the client the excess over the amount the attorney claims he is entitled to.

3. SAME—*under amended rule 40 an information to disbar need not be signed by Attorney General or State's attorney.* Under amended rule 40 of the Supreme Court an information to disbar need not necessarily be signed by the Attorney General or State's attorney but may be signed by the president and secretary of a bar association, and the information need not be sworn to except when filed by some aggrieved person.

INFORMATION to disbar.

JOHN L. FOGLE, for relator.

JOSEPH W. MERRIAM, (W. P. BLACK, and JAMES R. WARD, of counsel,) for respondent.

Mr. JUSTICE DUNN delivered the opinion of the court :

An information was presented by the Chicago Bar Association containing three counts, two of which charged the respondent, an attorney of this court practicing law in the city of Chicago, with collecting money for a client and refusing to account for it and pay over the amount due the client upon demand, and praying that the respondent's name be stricken from the roll. It is clearly shown, and in fact is admitted, that in one case the respondent collected \$59.80 and received \$5 from his client on account of costs which he was not required to use. The respondent states that he sent to his client a statement of account containing a charge of \$20 for his services and showing a balance of \$44.80 due the client. Demand was made for the proceeds of the collection, but the respondent failed to pay the amount due or any amount, and the client then placed the claim in the hands of a collection agency. After renewed demands the respondent paid \$15 of the amount but no more until after this information was filed, when he paid the balance. In the other case a claim was placed in the respondent's hands for collection against a debtor residing in New York. The respondent forwarded it to an attorney in New York, and at the request of the latter collected from his client \$15 for costs which he did not send to the New York attorney but kept. The claim was settled for \$60, out of which the New York attorney kept \$15 for fees, \$5 for expenses and \$11 which he claimed the respondent owed him on another account. He sent the respondent a draft for the balance, \$29. The respondent had, therefore, \$44 of his client's money in his hands and does not claim to have been entitled to a greater fee than \$20. The balance he should have paid his client upon demand, but he failed to do so until after the information was filed, when he paid \$40. He claims always

to have been willing to pay the amount due but that his client would never consent to accept less than \$60, the whole amount collected. The respondent never, however, tendered payment of any amount though his client was demanding payment.

Objection is made to the validity of the information because not signed by the Attorney General or a State's attorney and not sworn to. The information is signed by the president and secretary of the Chicago Bar Association. Counsel appear to have overlooked the amendment of rule 40, made at the February term, 1909, which expressly authorizes such information, and requires the information to be sworn to only when filed by some aggrieved person.

There is no substantial controversy as to the facts. The respondent insists that no demand was made upon him, and that there was a dispute in each case between him and his client as to the amount of his fees. The claim that no demand was made is based, not upon the fact that the client was not requesting payment of the proceeds of the collection, but upon the disagreement as to the amount of the respondent's fees, the respondent insisting that the clients were demanding more than they were, respectively, entitled to. On his own showing there was a balance due from the respondent in each case, and the disagreement as to the amount of his fees afforded no excuse to the respondent for refusing to pay the amount which he admitted to be due. An attorney who collects money for his client and refuses, without excuse, to pay it on demand is guilty of such a breach of professional duty as cannot be disregarded or lightly passed over.

The respondent will be suspended from practice as an attorney for one year and until he shall be permitted to resume practice by the further order of the court.

*Respondent suspended.*

GEORGE N. SARGENT *et al.* Defendants in Error, *vs.*  
CHARLES E. ROBERTS *et al.* Plaintiffs in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 2, 1914.*

1. **DEEDS**—*test of mental capacity of grantor to make a deed.* In making a deed the grantor must have sufficient mind and memory to comprehend the nature and effect of the act in which he is engaged, and even though his mind may be impaired incident to old age, still the deed will not be held invalid if in making the same he exercised his own will and understood the nature and effect of what he was doing.

2. **SAME**—*what constitutes delivery of a deed.* Delivery of a deed is essential to its complete execution and is largely a matter of intention, and the recording of a deed is *prima facie* evidence of delivery; and if the maker places the deed in the hands of a third party, the presumption arises that it was delivered for the benefit of the grantee.

3. **SAME**—*presumption where a life estate is reserved.* If the grantor in a deed reserves to himself a life estate a strong presumption will arise that it was intended that title should vest immediately in the grantee, for otherwise there would be no reason for the reservation.

4. **UNDUE INFLUENCE**—*what is undue influence.* Undue influence is a species of constructive fraud which the courts will not undertake to define by definite words or rules, and what constitutes undue influence will depend upon the circumstances of each case.

5. **SAME**—*when influence is wrongful.* If the influence exerted by the grantee is such as to deprive the grantor of his free agency and make his acts the acts of the grantee, then such influence will be held to be wrongful.

6. **SAME**—*what is not undue influence.* Undue influence means wrongful influence, but influence secured through affection is not wrongful, and a deed is not invalid if its execution was secured through affection or was procured by honest argument and untainted by fraud.

7. **SAME**—*when transactions between parties are valid.* Even if a fiduciary relation exists between grantor and grantee, transactions between them will be valid if they were entered upon with full knowledge of their nature and effect and were not the result of wrongful influence due to such relation.

WRIT OF ERROR to the Circuit Court of Morgan county;  
the Hon. OWEN P. THOMPSON, Judge, presiding.

M. T. LAYMAN, and WORTHINGTON, REEVE & GREEN,  
(L. O. VAUGHT, guardian *ad litem*,) for plaintiffs in error.

WILLIAM N. HAIRGROVE, and NEIGER & GORDLEY,  
(J. J. NEIGER, of counsel,) for defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Defendants in error filed a bill in the circuit court of Morgan county to set aside a deed and for partition of eighty-seven acres of farm land in said county owned by John T. Sargent (since deceased) and by him conveyed in fee simple to Charles E. Roberts, subject to a life estate. An answer was filed and the matter referred to a master in chancery to take evidence. Subsequently Charles E. Roberts died, and the bill was amended suggesting that fact and other persons were made defendants, including the infant son and only heir, Charles E. Roberts, for whom a guardian *ad litem* was appointed. The master reported in favor of defendants in error. The court approved the master's findings and entered a decree in accordance with the prayer of the amended bill, setting aside the deed and ordering partition. That decree is now before us by writ of error.

The bill alleged that the deed was without consideration, had been procured by undue influence over said Sargent by the said Charles E. Roberts, and had never been delivered. Roberts, in his answer, averred that Sargent had agreed that if Roberts would live with him until he died Sargent would deed to Roberts the farm, and that, relying on this promise, he had resided with Sargent until the latter's death and was at the time the original bill was filed in possession of the premises.

Roberts was a nephew of Sargent and had lived with him on the farm in question for about nine years previous to the latter's death. For the last two years Roberts was married and his wife had kept house for them. At his death, September 4, 1909, Sargent was a little past seventy



years of age. He had served in the civil war and while a soldier had contracted camp diarrhœa. Because of this disease he frequently sought medical attention, and on that account, also, it was necessary for him to have someone on the farm to look after it and care for him. For some three months before his death he had Bright's disease. For about six weeks of that period he was confined to his bed most of the time, and for about ten days before the deed in question was executed his family physician, Dr. W. C. Manley, of Franklin, drove out to the farm and visited him almost daily. August 11, 1909, the doctor visited him in the forenoon, and, finding that he was failing steadily, told him that his condition was serious, and advised him that if his business was not in shape he should fix it up. Sargent requested the doctor to go back to town and get Morris Keplinger, a banker in Franklin, and have the latter bring with him a blank suitable for a will and a blank for a deed. Dr. Manley went back to town and returned with Keplinger early in the afternoon. From their testimony it appears that they went into Sargent's room and found him alone. Whether or not undue influence was exercised in the execution of the deed depends very largely on what happened while the doctor and Keplinger were there. The evidence of the two is in substantial harmony except upon one or two points to which we shall refer. Keplinger testified that after they had talked a short time Sargent required attention on account of his diarrhœa and Roberts was called into the room to attend to him, after which Roberts left the room. Keplinger then began to talk with Sargent about what the latter wanted done with the property. When he started he supposed that Sargent wanted to make a will and asked him the names of his heirs. Sargent said he wanted his heirs to share equally, and Keplinger told him if that was the case he did not need to draw a will, as the law would take care of that. Keplinger testified that during the talk Sargent stated that he wanted to do something in particu-

lar for Roberts. At this point Roberts came from another room through an open door into the room where they were talking. Keplinger testified that he thought Roberts was called in there by Sargent, the doctor or himself, while Dr. Manley stated he did not think anyone called Roberts into the room. After Roberts came into the room the testimony of both the doctor and Keplinger is to the effect that he told his uncle that he thought the latter ought to make a deed to him of the place upon which they resided; that a will fixed as the one they were talking about wouldn't do any of the heirs any good, and that it would not be right to leave him simply a share along with the others, taking into consideration what he had done for his uncle during the years he had lived with him; that if his uncle deeded him the land he would not put in any bill for services in nursing and caring for him and would take care of Sargent as long as he lived. Sargent said that was satisfactory and told Keplinger to make the deed accordingly. Roberts then left the room and did not return while the doctor and Keplinger were there, unless he brought in a tax receipt to give a description of the land. According to the testimony of both the doctor and Keplinger, either Roberts or his wife went up-stairs and got the tax receipt and brought it down and neither of them afterwards came back into the room. Keplinger then drew the deed. Before he finished he asked Sargent if he wanted to retain an interest during his life, and the latter replied he did, and the deed was drawn with the ordinary provision reserving a life estate to the grantor. When he had finished Keplinger read it over to Sargent and asked him if that was the way he wanted it, and Sargent said it was. Sargent then signed it and Dr. Manley attached his signature as a witness. Bessie Seymour, an eighteen-year-old step-daughter of Roberts, testified she was in an adjoining room when this deed was drawn and through the open door she could hear what was said; that she heard Sargent ask her

step-father if he would rather have the place or money equal to it, and Roberts replied that he would rather have the place. After the deed was signed Keplinger told Sargent that he did not have his notarial seal with him and would have to take the deed back to Franklin and put his seal on, and asked him whether he wanted the deed recorded or kept in the bank, and Sargent told him to record it. In pursuance of this direction Keplinger attached his notarial seal and had the deed recorded. This is all the testimony as to what took place at the execution of the deed.

A number of witnesses testified that Sargent had said that he intended to give the farm to whoever took care of him. Some heard him say that if Roberts would get married and have someone to keep house for him he would give Roberts the farm, and others testified that he had stated that he intended Roberts to have the farm, or that the farm would be Roberts'. Others testified that he had stated some time previous that he intended to divide his property among his heirs. In addition to the farm he left between \$3000 and \$4000 in the banks at Franklin. After executing the deed he made no disposition of the other property on the day in question or at any other time before his death.

The defendants in error introduced evidence tending to show that Sargent was mentally weak about the time of the execution of the deed, and that Roberts, during the time he had resided with Sargent, had exercised influence over his actions. Some of Sargent's relatives testified that Roberts had expressed a desire not to have them visit Sargent. Dr. Manley testified that at the time Sargent signed the deed he was in his usual mental condition and was of sound mind and of sufficient mental ability to understand ordinary business transactions, and continued so up to within two or three days of his death. Two or three witnesses for defendants in error testified that Sargent's mental condition had partially failed. Three or four others testified

that he was absent-minded and would repeat and hesitate, but outside of this they noticed no change in his mental condition. Hypothetical questions embodying the facts as testified to were asked of three doctors called as experts. They all three testified that one exhibiting such symptoms and having the disease as testified to, showed symptoms of senile dementia and would be subject to suggestion from other people, but one of them testified that even though having senile dementia he might not be subject to suggestion from others.

A number of witnesses on behalf of plaintiffs in error who had known Sargent for years and many of whom had transacted business with him thought he was of sound mind and able to transact business whenever they saw him, among others, A. H. Wright and H. G. Keplinger, bankers, Charles W. Olinger, a general merchant, Andrew Boorup, a barber, and William Whalen, owner of a general store, all of Franklin; Bird Anderton, a neighbor, John S. Daugherty, an old soldier friend, and John G. Wright, a stock buyer, all thought he was capable of transacting ordinary business; that while he was growing weak physically, they thought his mind was not affected any more than it would ordinarily be by declining years. Nineteen other witnesses, two or three of them related to Roberts, testified to substantially the same effect. Some of them noticed an increasing deafness and two or three noticed his forgetfulness, but none of them could see any substantial change in his mental condition. Several of the witnesses had seen him up to within a few days of his death and some of them had business dealings with him about the time the deed was made. Dr. J. M. Elder, of Franklin, who had prescribed for him and had seen him as late as April, 1909, was asked the hypothetical question asked the other doctors and stated that one's mind under such a state of facts might be clear.

Defendants in error also offered testimony tending to show that Roberts was accustomed to use profane language

with great frequency and vigor and that he was sometimes rough in his manner to Sargent; that while he was living with the latter he found fault with some of his business transactions with reference to selling stock or caring for the farm. From this testimony it appears that sometimes Sargent followed Roberts' advice and at other times went contrary to it. No evidence is found in the record to indicate that Roberts did not take the best of care of Sargent during all the time he lived with him. Indeed, the evidence is to the effect that Sargent, on account of his disease, required a good deal of care, and that he had said more than once to neighbors or friends that Roberts was looking after him all right, and said, after Roberts was married, that the wife was a good housekeeper.

The test of mental capacity to make a deed is, that one must have sufficient mind and memory to comprehend the nature and effect of the act in which he is engaged. (*Kelly v. Nusbaum*, 244 Ill. 158; *Fitzgerald v. Allen*, 240 id. 80; *Riordan v. Murray*, 249 id. 517.) Even though the mind of the grantor may be impaired incident to old age, still if he is able to understand the nature of the business in which he is engaged and the effect of what he is doing and exercises his own will with reference thereto his acts are not invalid. Beyond question the evidence in this record shows that Sargent, before the execution of the deed, at that time and for some weeks thereafter was able to transact business and comprehended fully what he was doing at the time he executed the deed. Counsel for defendants in error practically concede this in their argument, but contend that his mind was so enfeebled by disease and old age that he was easily subject to the influence of those about him and was unduly influenced by Roberts to execute the deed. What constitutes undue influence will depend upon the circumstances of each case. Undue influence is a species of constructive fraud which the courts will not undertake to define by definite words or rules. (*Smith v. Henline*, 174 Ill.

184.) Influence, to render a conveyance inoperative, must be of such a nature as to deprive the grantor of his free agency. An undue influence means a wrongful influence; such an influence as makes the grantor or testator in the instrument executed speak the will of another and not his own. (*Dowie v. Sutton*, 227 Ill. 183; *Dorsey v. Wolcott*, 173 id. 539.) It is not sufficient to avoid a will or deed that its execution was procured by honest argument, untainted with fraud. Proper and legitimate influence, honestly acquired, is not the exercise of undue influence. A deed which but for such legitimate influence would not have been made will still be sustained if made freely and as a result of the maker's own conviction in the exercise of his own deliberate judgment. Influence secured through affection is not wrongful, and a will or deed will not be held void because of partiality influenced by such affection. (*Sturtevant v. Sturtevant*, 116 Ill. 340; *Wilcoxon v. Wilcoxon*, 165 id. 454; *Scars v. Vaughan*, 230 id. 572; *Bishop v. Hilliard*, 227 id. 382; *Carlock v. Carlock*, 249 id. 330.) Obviously, Keplinger, who drew the deed, and Dr. Manley, who was present at the time, thought that Sargent was capable of transacting business and that he was acting according to his own desire and will in the execution of the deed. The testimony shows, without controversy, that Roberts had nothing to do with getting Keplinger to come out to see his uncle. There is not the slightest evidence that Roberts had endeavored, on or before this day, to influence his uncle as to the disposition of the property. The weight of the evidence tends to show that the uncle intended to do something for Roberts over and above what he did for the other relatives. In view of the relations that had existed between them for some nine years, it was most natural and proper that Sargent should leave more to Roberts than he did to the other relatives. Whether Roberts came from the adjoining room of his own accord or whether he was called in by his uncle, Keplinger or Dr. Manley we do not con-

sider vital to the present issue. We are disposed to think, however, that the testimony is consistent with the theory that he was called into the room. While Dr. Manley does not think he was thus called, it is not at all strange that his remembrance of all the details should not be the same as Keplinger's. All that Roberts said there was what one would expect him to say under the circumstances. What Sargent did was in full harmony with what one might expect him to do when we consider the services that Roberts and his wife had performed, and, so far as this record shows, without compensation. We can reach no other conclusion than that the decree incorrectly finds that undue influence was exercised by Roberts over his uncle in procuring the execution of the deed here in question.

In this connection counsel for defendants in error argue that a fiduciary relation existed between Roberts and his uncle and therefore this deed was *prima facie* void, while counsel for plaintiffs in error argue strenuously that such a relation did not exist. Conceding, for the purpose of this case, that such relationship did exist, transactions between them will be held valid if it appears they were entered into with full knowledge of their nature and effect and resulted from the deliberate, voluntary and intelligent desire of both and not through influence engendered by their relationship. (*Bishop v. Hilliard, supra.*) What we have already said with reference to the execution of this deed shows conclusively that it resulted through the voluntary desire of the grantor and not because of any undue influence exercised upon him by the grantee.

Counsel for defendants in error argue that the deed was not delivered. The delivery of a deed is an essential part of its complete execution and is largely a matter of intention. (*Potter v. Barringer*, 236 Ill. 224.) The recording of a deed is *prima facie* evidence of its delivery. (*Valter v. Blavka*, 195 Ill. 610; *Blake v. Ogden*, 223 id. 204; *Ackman v. Potter*, 239 id. 578.) When the maker of the deed

parts with the possession of it to anybody, the presumption arises that it was delivered for the benefit of the grantee. (*Chapin v. Nott*, 203 Ill. 341.) All the circumstances surrounding this transaction show that the grantor intended to complete the transaction as to the execution and delivery of the deed and the conveyance of the property, so far as it could be done by any act of his at that time. No evidence is found in the record tending to show that the grantor did not intend to have such deed delivered. His request that the deed be recorded indicates that. The argument of counsel for defendants in error is without merit that the question asked by Keplinger of Sargent, "Do you want me to put it on record for you or hold it in the bank?" indicated, by the use of the words "for you," that delivery was not intended. Considering all the evidence on that point, it is manifest that Keplinger was asking Sargent whether he wanted the deed recorded or kept in the bank without recording, and that it was understood that the deed was considered as delivered. Nothing was said at the time about the grantor retaining any possession or dominion over it. All that was said and done then indicated to the contrary. The fact that the life estate was reserved to the grantor tends to support this same conclusion.

The argument of counsel for defendants in error that the reservation of a life estate shows that the grantor intended the deed to operate as a will cannot be sustained. The reservation of a life estate in the grantor raises a strong presumption that it was intended that the title should immediately vest in the remainder-man, for the reason that if such intention had not existed there would be no reason for the reservation. *Riegel v. Riegel*, 243 Ill. 626; *Hill v. Kreiger*, 250 id. 408; *White v. Willard*, 232 id. 464.

The decree of the circuit court is reversed and the cause remanded, with directions to enter a decree dismissing the bill for want of equity.

*Reversed and remanded, with directions.*



THE PEOPLE *ex rel.* Edward Zilm, County Collector,  
Appellee, *vs.* LEVI CARR *et al.* Appellants.

*Opinion filed October 16, 1914—Petition stricken December 2, 1914.*

1. DRAINAGE—*adoption of resolution for assessment constitutes the levy.* The adoption, by farm drainage commissioners, of the resolution provided for in section 26 of the Farm Drainage act constitutes the levy of the assessment to be spread against the lands in the district and must precede the making of the contract for the construction of the work of the district.

2. SAME—*mere fact that resolution was signed by commissioners and filed with clerk is not sufficient.* The mere fact that the resolution provided for in section 26 of the Farm Drainage act was signed by the commissioners and filed with the clerk does not establish a valid levy, but it must appear that the resolution was adopted at a legal meeting of the commissioners.

3. SAME—*adoption of resolution must be shown by the drainage record.* The record which section 2 of the Farm Drainage act provides shall be kept by the clerk to show the proceedings of the commissioners is the only way in which the adoption of the resolution for the levy of a special assessment may be shown.

4. SAME—*what does not supply omission of record of adoption of resolution.* If the drainage record does not show the adoption of the resolution for the assessment at the meeting when it is claimed that it was adopted, either as originally written up or as amended, the omission cannot be supplied by a recital in the record of subsequent meetings, or in a resolution adopted at a subsequent meeting, that such action was taken at the former meeting.

5. JUDICIAL NOTICE—*county court does not take judicial notice of contents of record except in the proceeding before it.* A third attempt to levy a drainage assessment against certain lands, after the land owner has successfully prosecuted appeals from the judgments in the two former proceedings, is not the same proceeding as the former ones, and in order to sustain a claim that an objection made in the third proceeding could have been urged in the former ones it is incumbent upon the People to offer in evidence such portions of the record in the other cases as will disclose that fact, as the county court will not take judicial notice of the contents of its records except in the proceeding before it.

6. APPEALS AND ERRORS—*when objection to drainage record is not foreclosed by former appeals.* An objection that the drainage record does not show any valid resolution for the assessment may be urged on the third attempt to levy the assessment against cer-

tain land, where the judgments in the former proceedings were reversed on other grounds and remanded without any directions to the county court, and it does not appear from the opinions filed in such cases that the objection was considered or could have been considered on the errors assigned, or that the drainage record was before the court for consideration. (*Morgan Creek Drainage District v. Hawley*, 255 Ill. 34, *Semple v. Anderson*, 4 Gilm. 546, *Ogden v. Larrabee*, 70 Ill. 510, and *Lusk v. City of Chicago*, 211 id. 183, distinguished.)

FARMER, J., dissenting.

APPEAL from the County Court of LaSalle county; the Hon. A. T. LARDIN, Judge, presiding.

L. W. BREWER, and LESTER H. STRAWN, for appellants.

BUTTERS & ARMSTRONG, BROWNE & WILEY, and CRAIG & CRAIG, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

The county collector of LaSalle county applied to the county court of that county, at the May, 1913, term thereof, for judgment and an order of sale against lands of appellants located within Drainage District No. 1 of the town of Ophir, LaSalle county, for alleged delinquent drainage assessments. Appellants appeared and interposed numerous objections, only one of which need here be noticed, viz., that no resolution ordering any amount of money whatever to be raised by special assessment upon the lands of the district was passed or adopted by the drainage commissioners prior to letting the contract for the construction of the work of the district or prior to the completion of such work. The court overruled the objections and rendered judgment against the lands for the alleged delinquent assessments. This appeal has been prosecuted from that judgment.

The drainage district in question was organized under the Farm Drainage act, the order declaring the district fully organized having been entered on January 25, 1905. On

March 1, 1905, commissioners were elected. On June 17, 1905, these commissioners completed a classification of the lands in the district and gave notice of a meeting to be held within the district on July 10, 1905, to hear objections to the classification. Various changes were made in the classification of lands at that meeting and a modified classification roll was made and adopted. Certain land owners, not including any of the appellants here, appealed to the county court from the order of the commissioners adopting and confirming the modified classification. A jury empaneled in the county court upon that appeal made a new classification of all the lands in the district. Thereafter the commissioners advertised for bids for constructing the work of the district, and on August 11, 1905, a contract was let for the construction of the work, the contract price being about \$27,000. Afterwards the commissioners spread an assessment of \$29,000, divided into three installments,—two of \$10,000 each and one of \$9,000,—against the lands in the district, using the classification as made by the jury in the county court as a basis for spreading the assessment. Numerous land owners paid the first installment of the assessment spread against their lands. Appellants refused to pay this installment and successfully resisted an application made by the county collector for judgment and an order of sale against their lands, the objection made and sustained being that the commissioners, in spreading the assessment, had erroneously followed the classification made by the jury in the county court instead of the modified classification made by the commissioners on July 10, 1905. (*Carr v. People*, 224 Ill. 160.) After the decision was rendered in the case just referred to, the commissioners again attempted to spread the assessment of \$29,000 against the lands of the district in accordance with the modified classification adopted by them on July 10, 1905. Appellants refused to pay the assessment and successfully resisted the application of the county collector for judgment and order of sale

against their lands, the grounds upon which judgment was refused being set out in the opinion filed in *People v. Carr*, 231 Ill. 502. In the meantime the work of the district had been completed and all of the land owners except appellants had paid the assessments spread against their lands. No further action was taken by the commissioners with reference to making or spreading an assessment against appellants' lands until February 8, 1913, when the commissioners met within the district and adopted a resolution in which, among other things, it was recited that at the meeting of July 10, 1905, above mentioned, after the land had been classified, the following resolution was adopted: "Resolved by the drainage commissioners of Drainage District No. 1 of the town of Ophir, LaSalle county, State of Illinois, that it be, and it is hereby, ordered that the amount of \$29,000 be raised by special assessment upon the lands of the district aforesaid as the same may be necessary, and that such amount be and is apportioned among the several tracts in the name of the owner thereof, when known, according to acres of each and its figure of classification on the graduated scale, so that each tract may bear its equal burden in proportion to benefits;" that said resolution was inadvertently mislaid and temporarily lost and was not filed at said meeting but was afterwards found and was filed with the clerk of the commissioners on August 10, 1905, and that it was consequently inadvertently omitted from the minutes of the meeting held on July 10, 1905; that a meeting of the commissioners was held on August 10, 1905, to open bids for constructing the work of the district and was adjourned to August 11, 1905, when the bid of G. A. Williams was accepted and a contract entered into with him for constructing the work of the district, and that at this meeting it was ordered that the assessment of \$29,000 be divided into three installments, the first to be for the sum of \$10,000 and to be due August 10, 1905, the second to be for the sum of \$10,000 and to be due February 1, 1906, and

the third to be for the sum of \$9000 and to be due June 1, 1906. The resolution, after making other recitals not necessary to be noticed, directed the clerk of the district to write up and restore the minutes of the meetings of August 10 and 11, 1905, in order to show what was transacted at those meetings as recited in the resolution. The meeting of July 10, 1905, which was called for the purpose of considering objections to the classification, and the meeting of March 1, 1905, which was held for the purpose of electing commissioners, were the only meetings prior to that of February 8, 1913, held within the boundaries of the drainage district. The meetings of August 10 and 11, 1905, were not held within the district, but were held at the office of the attorney for the commissioners in the city of Ottawa. The minutes of the meeting of July 10, 1905, as the same appear in the drainage record, do not show the presentation or adoption of any resolution. From a file-mark on the resolution above set out it appears that it was filed with the clerk of the commissioners on August 10, 1905, and as so filed it was signed by all the commissioners. In accordance with the directions contained in the resolution of February 8, 1913, the clerk thereafter wrote into the drainage record the minutes of the meetings of August 10 and 11, 1905, showing the proceedings recited in the resolution to have been taken at those meetings, but no change in or addition to the record of the minutes of the meeting of July 10, 1905, was made by the clerk. The commissioners then spread the proportionate part of an assessment of \$29,000 against appellants' lands, based on the classification as modified by them at the meeting of July 10, 1905, and appellants having refused to pay the assessments against their lands, the assessments were returned as delinquent and the application first above mentioned for judgment and an order of sale was made to the county court. This application was based upon a return made by the treasurer of the drainage district showing that the assessments were spread

against appellants' lands on February 8, 1913, by virtue of a levy made July 10, 1905.

Appellee contends that the resolution ordering \$29,000 to be raised by special assessment upon the lands of the district was adopted by the commissioners at the meeting held July 10, 1905, and in support of this contention relies entirely upon the record of the meeting of February 8, 1913, showing the adoption at that meeting of the resolution which recites that a levy of \$29,000 was made at the meeting held July 10, 1905, and upon the record of the meeting of August 10, 1905, which was written up by the clerk after February 8, 1913, and which also refers to the adoption of a resolution on July 10, 1905, levying the sum of \$29,000. Appellee does not contend that the resolution was passed at any other time or that any other meeting was ever held within the district at which such a resolution could have been adopted.

In support of their objection that no such resolution was adopted prior to letting the contract for the work or prior to the completion of the work, appellants offered in evidence all that portion of the drainage record which had been written up prior to February 8, 1913, including the minutes of the meeting of July 10, 1905, and it appears therefrom that no record was made of the adoption of the resolution in question at the meeting of July 10, 1905, or of its adoption at any other time. Appellants also called numerous witnesses to show that no such resolution was, in fact, adopted at the meeting of July 10, 1905. Fred T. Davis, who was one of the commissioners on July 10, 1905, but who had ceased to hold such office before February 8, 1913, testified that he attended the meeting of July 10, 1905, and that no such resolution was adopted while he was present, but that later,—and he thought it was when the bids were opened, on August 10, 1905,—the three commissioners signed such a resolution at the office of their attorney in Ottawa. J. E. Hill, who was town clerk and *ex-officio* clerk of the

commissioners on July 10, 1905, and who had continued to hold such office until and including February 8, 1913, testified that he attended the meeting of July 10, 1905, but that James P. Garland, one of the commissioners, kept the minutes of that meeting, and that the witness copied them into the drainage record after they had been written up and turned over to him by the attorney for the commissioners; that there was no record of the adoption of the resolution in question in the minutes of that meeting and that no such resolution was passed while the witness was present. He further testified that the record of the meeting of February 8, 1913, which covers seventy-eight pages of the drainage record, was prepared and handed to him by one of the attorneys for the commissioners prior to the meeting of February 8, 1913; that he does not know whether or not the matters and things recited therein are true, and that he did not furnish any information upon which to base the recitals contained in the record of the minutes of the meeting of February 8, 1913, and in the resolution passed at that meeting. James P. Garland, the commissioner referred to in the testimony of Hill, testified that he acted as clerk at the meeting held July 10, 1905, and kept correct minutes of the proceedings had at that meeting, and that those minutes contained no mention of the adoption of any resolution levying \$29,000. Six other witnesses testified that they attended the meeting of July 10, 1905, and that no such resolution as appellee claims was passed at that meeting was presented or adopted. No witness testified that any such resolution was, in fact, adopted, but appellee, as hereinbefore stated, relies entirely upon the record to sustain its position, and contends that the record imports absolute verity and cannot be impeached by the testimony of witnesses.

Section 26 of the Farm Drainage act provides that the commissioners, by resolution, shall order such amount of money to be raised by special assessment upon the lands of the district as may be necessary, and that such amount shall

be apportioned among the several tracts in accordance with the classification finally established. The adoption of such resolution constitutes the levy of the assessment to be spread against the lands of the district and must precede the making of the contract for the construction of the work of the district. As we said in *People v. Kuns*, 248 Ill. 42: "This court has held repeatedly that a drainage district under the Farm Drainage act has no power to create in advance, either under the Farm Drainage act or under the Levee act, any indebtedness for completing an improvement and then levy an assessment to meet it." It necessarily follows that if appellants established by competent evidence that no such resolution as is required by said section 26 was adopted by the commissioners prior to the time the contract was let for the construction of the work of the district, then their objections to the application of the county collector for judgment and order of sale against their lands should have been sustained. The mere fact that such a resolution was signed by the commissioners and filed with the clerk does not establish a valid levy, but it must appear that the resolution was adopted at a legal meeting of the commissioners. (*People v. Warren*, 231 Ill. 518.) Section 2 of the Farm Drainage act provides that the clerk of the commissioners shall keep in a well-bound book, to be known as the drainage record, a record of the proceedings of the commissioners, and it is only by this record that the adoption of such resolution can be shown. (*People v. Carr, supra; People v. Warren, supra.*) Not only does the record of the proceedings of the meeting of July 10, 1905, fail to show the adoption of a resolution levying \$29,000, or any other sum, but it was affirmatively shown by the testimony of numerous witnesses who attended that meeting that the record of the proceedings there had speaks the truth and that no such resolution was adopted. The recital in the record of the proceedings of subsequent meetings, or in a resolution adopted at a subsequent meeting, that such action had been



taken at the meeting of July 10, 1905, will not avail to supply the omission, if any, in the record of the proceedings of the meeting of July 10, 1905. It is true, as contended by appellee, that the clerk had the power to amend the record of the proceedings of that meeting so that the same would show the adoption of the resolution in question, (*County of DuPage v. Commissioners of Highways*, 142 Ill. 607; *Board of Education v. Trustees of Schools*, 174 id. 510; *People v. Zellar*, 224 id. 408;) and that had the record been so amended it could not have been contradicted by parol, (*People v. Carr, supra*,) but appellants' only remedy, in case no such resolution was, in fact, adopted at the meeting of July 10, 1905, would have been an action to recover the damages sustained by them by reason of the making of a false record of the proceedings of that meeting. The clerk, however, did not amend the record of the minutes of the meeting of July 10, 1905, and the record of the proceedings had at that meeting still fails to show the adoption of any resolution levying an assessment against the lands of the district.

Appellee contends, however, that as the objection above considered was not presented in the case of *Carr v. People, supra*, nor in *People v. Carr, supra*, it cannot now be urged to defeat the assessments extended against appellants' lands. Appellee's principal argument in support of this contention is based upon the assumption that the drainage record was before us in each of the former cases, and that the objection here made to the \$29,000 assessment therefore necessarily appeared upon the face of the record in each of those cases, although it is also argued that as this objection could have been made to the application of the county collector for judgment in each of the former cases it cannot be interposed in this proceeding. That the objection was not considered by this court in either of the former cases is apparent from the opinions filed therein. Whether this error in the former judgments appeared upon the face of

the record which was brought to this court in either of those cases is not disclosed by the opinions rendered, and it is not made to appear in this case that the question here raised could have been presented to this court upon either of the two former appeals. The case at bar is not the same proceeding as either of the two former *Carr* cases although it is between the same parties and involves the same subject matter, and the county court therefore could not take judicial notice of the contents of the record in either of the two former cases. A court will take judicial notice of its own records and thus dispense with proof identifying such records, but it will not take judicial notice of the contents of any of its records except the one in the proceeding before it. (17 Am. & Eng. Ency. of Law, 926; 16 Cyc. 918; *Streeter v. Streeter*, 43 Ill. 155; *National Bank of Monticello v. Bryant*, 13 Bush, 419; *McNish v. State*, 47 Fla. 69.) If the error now relied upon by appellants for reversal appeared upon the face of the record in either of the former cases between these parties involving this same subject matter, in order to bring that fact to the attention of the court it was incumbent upon appellee to offer in evidence upon the hearing such portions of the record in the former cases as would disclose that fact. Not having done so, we are not warranted in assuming that the errors above considered could have been presented to this court upon the record made in either of the two former *Carr* cases, as we can review only the matters presented to the county court and its action thereon in this case.

In *Morgan Creek Drainage District v. Hawley*, 255 Ill. 34, which appellee contends conclusively settles this question in its favor, the plaintiffs in error urged a reversal of the judgment "for alleged errors concerning matters contained in the record at the time it was reviewed on the former writ of error," and in holding that such alleged errors would not be considered, we said: "That writ of error brought the case, as to *Hawley*, to this court in its

entirety, and it was the duty of the plaintiff in error to present all the existing grounds for the reversal of the judgment. A party cannot on a second writ of error take advantage of any error which existed and might have been assigned on the former record." In the case at bar, however, as we have above pointed out, it does not appear that the record in either of the former cases disclosed the defect in the drainage record. It therefore does not appear that appellants are attempting to "take advantage of any error which existed and might have been assigned on the former record," and for this reason what was said in the *Hawley case* has no application to the case now before us.

In support of its contention appellee also cites and relies upon *Scemple v. Anderson*, 4 Gilm. 546, and *Ogden v. Larrabee*, 70 Ill. 510, and says that these cases lay down the principle which should be applied here. In the first mentioned case the doctrine was announced that "in this court it will be presumed, when a party sues out a writ of error and brings his case here for adjudication and the same is determined upon the merits and errors assigned, that he has no further objection to urge against the record, and that if errors exist which are not so assigned, that they are waived;" and in the *Ogden case* it was said to be a general rule that "where a cause has been heard in the circuit court, reviewed in the Supreme Court and has been remanded with directions as to the decree that shall be entered, a party cannot, on a subsequent appeal, assign for error any cause that accrued prior to the former decision." The rules laid down in these cases have been repeated and applied in numerous subsequent cases.

The doctrine announced in the *Scemple case* is not applicable here because the decisions in the two former *Carr cases* did not determine the merits of the controversy now existing between the parties. So far as appears from the opinions filed in those cases there were no assignments of error calling upon this court to decide whether a valid as-

sessment had been levied by the commissioners which could be spread against the appellants' lands. That question was therefore not judicially determined in either of those cases. The judgment in each of the former cases was reversed and the cause was remanded to the county court without any directions to the lower court. The rule laid down in the *Ogden case* is applicable only when a cause is remanded with directions to enter a certain decree, and can therefore have no application to the case now before us.

In support of its contention that as the objection above considered could have been, but was not, made to the former applications of the county collector for judgment for delinquent assessments based upon this same drainage record it is now too late to urge such objection, appellee relies upon *Lusk v. City of Chicago*, 211 Ill. 183. In that case it appeared that the validity of an ordinance providing for a local improvement had been attacked and the objections made thereto had been sustained upon appeal and the cause remanded. When the case was re-docketed in the county court the objectors filed additional objections to the ordinance which had not been made upon the former hearing. In holding that no objection to the ordinance except such as had been urged in this court upon the appeal could be considered upon the second hearing in the county court, we said: "When the validity of the original ordinance was attacked at the first hearing all the grounds of objection as to the validity of the ordinance should have then been presented, and not having been then presented could not be presented afterwards or now. To hold that in the trial of a cause the constitutionality of a law or the validity of an ordinance may be attacked upon one ground and an appeal prosecuted and a decision of a court of review had upon that question, and when the cause is remanded and again placed upon the docket the same statute or ordinance may be attacked upon another ground requiring another appeal to determine the validity of the same

ordinance in the same proceeding, is a practice that can not be permitted to obtain;" and we further said in this connection: "It is a well settled rule that when a cause is litigated and that litigation prosecuted to a court of appeals and passed upon, all questions that were open to consideration and could have been presented, relating to the same subject matter, are *res judicata*, whether they were presented or not." The controlling fact upon which the decision in the *Lusk case* was based was that a certain ordinance had been attacked in this court by the appellants, who, after the cause had been remanded, sought to attack it on other and different grounds, and it was held that the appellants had waived all objections to the ordinance which were not presented upon the first appeal. In the case at bar, however, it does not appear that the drainage record, upon which the assessments involved in the former cases and in this case have been based, has ever before been before this court for consideration or that it was attacked by these appellants in either of the former cases. The doctrine announced in the *Lusk case* can therefore have no application here. On the contrary, the right to file additional objections in a case such as the one at bar after a judgment has been reversed and the cause remanded generally to the county court, and thereby present a defense which existed but was not presented at the former hearing or upon the appeal, has been recognized by this court in *Green v. City of Springfield*, 130 Ill. 515, and in *People v. Waite*, 243 id. 156.

We are therefore of the opinion that appellants were not precluded by the former proceedings from presenting the objection in this case that no resolution ordering any amount of money whatever to be raised by special assessment upon the lands of the district was passed or adopted by the drainage commissioners prior to letting the contract for the construction of the work of the district or prior to the completion of such work.

As the record of the proceedings of July 10, 1905, fails to show the adoption of any resolution levying an assessment the objection of appellants should have been sustained.

The judgment of the county court is reversed and the cause remanded, with directions to enter a judgment in accordance with the views herein expressed.

*Reversed and remanded, with directions.*

Mr. JUSTICE FARMER, dissenting.

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JAMES MONAGHAN *et al.* Appellees, *vs.* BRIDGET GREEN  
*et al.* Appellants.

*Opinion filed October 16, 1914—Rehearing denied Dec. 2, 1914.*

1. WITNESSES—*when relationship of a witness to complainants does not disqualify her.* The fact that a witness offered in a will contest case is the mother of the complainants does not make her an interested party nor constitute any objection to her testifying if she is otherwise qualified.

2. SAME—*when widow of testator cannot testify.* In a will contest case the widow of the testator is not a competent witness to testify to the mental condition of the testator, even though she has been divorced from him for some time, where her testimony concerns conversations, facts and circumstances occurring during the time the marital relation existed, the knowledge of which she obtained only by means of such relation.

3. APPEALS AND ERRORS—*when objection to action in refusing instructions cannot be considered.* An objection to the action of the court in refusing certain instructions in a will contest case cannot be considered on appeal, where such objection was not assigned as one of the grounds of the motion for a new trial.

APPEAL from the Circuit Court of Madison county; the  
Hon. GEORGE A. CROW, Judge, presiding.

KEEFE & SULLIVAN, and B. J. O'NEILL, for appellants.

D. H. MUDGE, and GEO. W. CROSSMAN, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

The appellees, James Monaghan and Frank Monaghan, filed their bill in the circuit court of Madison county to contest the will of their father, William Monaghan, deceased, on the ground that he was of unsound mind, and on the further ground that appellants Bridget Green, James Green, her son, and Thomas Green, her husband, procured the execution of the will by means of undue influence. The issue as to whether the instrument in controversy is the last will and testament of William Monaghan has been twice submitted to a jury and each trial has resulted in a verdict in favor of the contestants. The first verdict was set aside by the chancellor and a new trial granted. When the same verdict was returned upon the second trial the court overruled the motion for a new trial and entered a decree finding the instrument in controversy to be null and void and setting aside the probate thereof. From that decree the defendants to the bill have prosecuted this appeal.

William Monaghan, the testator, died at the home of his sister, Bridget Green, in Alton, December 14, 1911. He was about sixty-six years of age at the time of his death. He left him surviving his sons, James Monaghan and Frank Monaghan, the appellees, and his mother, his brothers, Thomas, John and James, and his sisters, Bridget Green and Margaret Mullen. His wife, Susan Monaghan, to whom he was married in 1869, obtained a divorce from him in 1908 or 1909. She also survived him. The will in controversy was executed September 28, 1911. By this will he devised his real estate to his sisters, Bridget Green and Margaret Mullen, his brother, John Monaghan, and his nephew, James Green, giving to Bridget Green a lot upon which he had in 1910 erected a building for use as a saloon and which was the most valuable tract of real estate owned by him. He left no personal property. His brother Thomas Monaghan, and Thomas Green, the husband of Bridget Green, were named as executors of the will. The eighth

clause of the will provided that his sons, James and Frank, should have no share in his estate. The evidence shows that he located at Alton about the year 1892, and from that time until 1908 conducted a saloon in a building which he erected and in which he and his wife also conducted a hotel. This building was known as the Monaghan Hotel. In 1907 he left his wife and was taken into the home of his sister, Bridget Green, where he resided until the time of his death. In 1908 he sold his saloon business and was not thereafter actively engaged in that business. In 1909 his wife instituted suit against him for partition of the Monaghan Hotel property and for an accounting. He contested the suit and his two sons testified therein on behalf of their mother. The evidence on behalf of the appellants tends to show that thereafter he made statements to some of his friends to the effect that as his sons had assisted their mother in that litigation they would get none of his property, while the evidence on behalf of appellees tends to show that thereafter he remained on friendly terms with his sons. In 1910, after the partition proceedings had resulted in a sale of the Monaghan Hotel property, he purchased a lot and erected a two-story building thereon. This is the property which he devised to Bridget Green. He rented the first floor of the building to Thomas Green, who thereafter conducted a saloon, known as the Bee Hive saloon, therein. The second floor was arranged for a dance hall and was rented for that purpose by William Monaghan to other parties. The evidence further shows that William Monaghan had for years used intoxicating liquors to excess, and that during the last year of his life he spent most of his time in the Bee Hive saloon and in a saloon conducted by a man named Schmerge. For several years he was afflicted with a disease of the bladder, which manifested itself during the later years of his life by a nervous or palsied condition of the hands. The immediate cause of his death, according to the testimony of his physician,



was septic urea. His last illness covered a period of about a month, the last two weeks of which he was confined to his bed.

The testimony of the attorney who drew his will and of the two attesting witnesses to the will is, that at the time William Monaghan executed the will he was of sound mind and memory, and the testimony of the attending physician is that during his last illness he was of sound mind. In addition to these witnesses fifteen other witnesses called by the proponents, who had known Monaghan for a great many years and who frequently met and conversed with him during the last year of his life, testified that he was of sound mind. Among these witnesses was the cashier of the bank at which Monaghan transacted his banking business, several agents of breweries and wholesale liquor dealers with whom Monaghan had transacted business when he was conducting a saloon, a lawyer, an insurance agent and a lumber dealer.

Seventeen witnesses testified on behalf of the contestants, very few of whom testified positively that he was of unsound mind. George W. Hildebrandt, who seems to have been engaged in the business of operating slot machines, testified that he knew Monaghan about fourteen years; that during the last year of his life he was with him every week; that he frequently took buggy rides with him; that at times Monaghan talked "peculiar," by which the witness said he meant he would "forget himself," and at other times he would be all right; that they talked about some things which the witness said he would not repeat; that he told the witness things which the witness knew were unreasonable, and the next day he would tell the witness "different." When asked about his mental condition he replied that he could "hardly say about that."

John Falkenberg, a brother of Monaghan's divorced wife, testified that in 1884 or 1885 he was associated with Monaghan in operating a coal mine at Bethalto, Illinois;

that later the witness moved to Kansas City but at intervals returned to Bethalto and Alton to visit his relatives; that he observed that Monaghan was growing feeble in mind and body and could not get around as well as formerly; that about the first of November, 1911, he was in Alton and boarded a street car; that Monaghan was on the car; that the witness approached and shook hands with him; that Monaghan did not recognize the witness, but said, "You have got the best of me." From this circumstance the witness formed the opinion that his mind had become weakened.

Fritz Dahlquist testified that he knew Monaghan for six years; that he saw him nearly every day at Schmerge's saloon, playing cards and drinking whisky and beer; that he got excited and "talked right quick" when playing cards, and that his hands shook so that when he took up a glass of whisky or beer he would spill most of the contents. He further testified that at times Monaghan played a "pretty good game" of cards and at other times he did not know what he was doing.

Charles Reis testified that after the Bee Hive saloon was built he saw Monaghan on one occasion in Schmerge's saloon; that he was short some money and asked the witness to count his money, but that he told Monaghan he did not want to have anything to do with his money. This witness also testified that he had frequently played cards with Monaghan in saloons, and that upon such occasions, during periods of from two to three hours, he would take a drink every fifteen minutes, and that he was so nervous that he could not raise the glass to his lips without spilling half the contents and would often get someone to assist him in raising the glass to his lips.

J. A. Williams, a bar-tender at Schmerge's saloon, testified that he knew Monaghan for five or six years. When asked about his physical condition he said that he was an old gentleman and pretty feeble. He expressed no opin-

ion upon his mental condition, but testified that when the Bee Hive saloon was under course of construction he saw

- Thomas Green pay off the workmen once or twice.

F. William Sontag testified that he knew Monaghan for about three years; that during the last year of his life his health was failing and he did not seem to be as bright as formerly; that during the latter part of his life he did not seem to be able to recognize the witness. He testified, however, that Monaghan did recognize him and talked to

- him when he met him on the street, and that during those conversations he did not observe anything wrong with his mental condition.

James Hudson testified that he had a business transaction with Monaghan about six years ago; that he was selling a piece of property to a party who held a note against Monaghan and who wanted the witness to take the note in part payment of the purchase price; that he took the note to Monaghan's place of business; that Thomas Green, who was tending bar there, told him that Monaghan was having "one of his spells" and was lying down in his room; that he saw Monaghan and that Monaghan would not acknowledge the note; that he said he did not know whether it was his note or not; that the witness saw "his condition" and did not want to transact business with a man "in that line;" that afterwards he saw Monaghan several times and on one occasion helped him off a street car; that at that time he was not in a safe condition to "handle himself;" that the witness asked him if he could "navigate himself home," and that Monaghan replied that he could. This witness was asked the following question: "From your observation of him, talking to him in a business way, you can state what, in your opinion, whether he was of sound or unsound mind," and replied: "Well, he was not of sound mind at this time; in fact, I could not speak to him on the subject at all to any extent; he would not acknowledge the note; he did not know whether it was

his note or not; if you do not know your own note I am satisfied you cannot do business."

John White testified that he was personally acquainted with Monaghan for about three years; that he frequently met and talked with him in Schmerge's saloon and at the Bee Hive saloon; that he rented the dance hall above the Bee Hive saloon from Monaghan; that during the last six months of his life he was "quite sociable;" that in his conversation he was very forgetful and that in talking he would "change;" that he was nervous and walked with a cane; that the witness generally met him about 10:30 o'clock at night and they would talk about various matters. Upon cross-examination this witness testified that he dealt with Monaghan exclusively in renting the dance hall and in fixing the rent therefor; that he paid him two dollars per night; that he paid Monaghan this rent the first two nights and that Monaghan then told him he could pay the rent to Mr. Green. Upon re-direct examination the witness testified that from his observation of Monaghan during the last two or three months of his life it was his opinion that he was not of sound mind.

E. H. Lamb, a sewing machine agent, testified that during the last four or five years of Monaghan's life he lived near him and saw him almost every day; that as a rule he would see him in the evening either at Schmerge's saloon or at the Bee Hive saloon; that during the last six months of his life he was quite feeble; that he was very nervous; that his mind had gone all to pieces before he died; that during the last year he was like a child; that the witness was with him nearly every evening; that in conversation he would repeat, telling the same thing over and over again as though he had never told it before; that he would want to tell the witness something new but it would always be something he had told him before. This witness was then asked: "From your association with him, observing him and talking to him, in your opinion,—the last

three months, say, before his death,—was he of sound or unsound mind, in your judgment and opinion? What do you say?” and replied, “I do not know just how to answer that question.” The following question was then propounded: “Well, I will put it this way: From your observation of him, your talking to him and seeing him, in your opinion what was the condition of his mind so far as to being sound or unsound?” and the witness replied: “Well, he was of unsound mind, what I would term, in a business way; he was not able to transact business; that is the way I will frame it.” On cross-examination the witness stated that he had never had any business dealings with Monaghan; that his physical disability became apparent to the witness in 1910 or 1911; that his opinion regarding Monaghan’s mental condition was based on the fact that he would repeat the same story to the witness each time he met him, but the witness was unable to relate anything that Monaghan had ever repeated to him or anything that he had ever said to him which would indicate that Monaghan was of unsound mind.

Llewelyn Randall, a carpenter, testified that during the last six months of Monaghan’s life he had met and conversed with him on the street and in Schmerge’s saloon; that there were times when he thought he was perfectly rational and then there were times when he thought he was not capable of doing any business; that he was very nervous and would talk and act like a man who was drinking too much.

John Hartnett testified that on September 28, 1911, he met Monaghan and at his invitation went into a saloon and had a drink with him; that Monaghan was so nervous that the witness had to lift the glass to Monaghan’s lips in order for him to drink.

Susan Monaghan, the divorced wife of William Monaghan, was, over the objection of appellants, permitted to testify. She testified that during their married life Mona-

ghan was a hard drinker and that in 1904 or 1905 he had delirium tremens for three weeks; that after recovering from that attack he was very nervous; that he continued to drink whisky and would get drunk and stay drunk for two or three weeks at a time, and that he never permitted himself to get sober; that judging from his actions, conduct and manner while she was living with him as his wife, he was of unsound mind. This witness was further permitted to testify that Monaghan had previously made two wills; that in the first will he had directed an equal division of his property between his two sons, and in the second will had given his son Frank a larger portion of his estate than his son James. She further testified that both of these wills had been executed before Monaghan left her, in 1907.

The testimony of Dr. R. W. Giberson, who was called by the contestants, is to the effect that the long and excessive use of intoxicants will cause a deterioration of brain cells, producing an unsound condition of the mind and mental incapacity to transact business. This witness had never seen William Monaghan.

Anthony W. Young testified that in 1906 he was mayor of Alton and knew Monaghan intimately at that time; that he seemed to converse intelligently upon all subjects but seemed a little nervous; that he last saw him in 1911; that he appeared to be getting old very fast and was very feeble; that during the fall of 1911 the witness met him on the street and spoke to him, but that Monaghan did not seem to know him nor to care to talk to him.

O. W. Weinman, a barber, testified that during the last year of his life Monaghan was in his barber shop nearly every day; that he was in poor health and very often would sleep there in the afternoon; that on one occasion, a few weeks before his death, he remained in the barber shop all night and slept in the barber chair; that he was very drunk that night and was intoxicated every day. On

re-direct examination he was asked: "From your observation of Mr. Monaghan, talking with him and being with him, in your opinion, now, was he of sound mind or unsound mind?" and replied, "Well, he seemed to be kind of unsound."

A daughter of Margaret Mullen testified that she lived with her aunt, Bridget Green, during the same period that William Monaghan lived with her; that she had heard Mrs. Green say that because Monaghan was drunk he did not realize what he was doing all the time.

James Monaghan, the last witness called by appellees, testified that he saw William Monaghan, his brother, three or four times during the last year of his life; that he observed that he had become nervous and "would talk a little bit wild sometimes," by which he said he meant that he "would speak of certain people in a pretty harsh manner and then in a short while would do the same thing again." He further testified that he thought during the last few months of his brother's life his mind was a little unsound.

The above is, in substance, all the testimony offered by appellees bearing upon the mental condition of the testator.

The evidence offered to establish the charge of undue influence consisted of testimony which tended to show that during the year 1907, while Monaghan was conducting the saloon in the Monaghan Hotel building, he employed Thomas Green as bar-tender; that a short time afterwards he discharged his son Frank, who was tending bar for him, and shortly afterwards left his wife and went to live with his sister Bridget Green, the wife of Thomas Green; that Thomas Green negotiated the sale of the saloon business in the Monaghan Hotel building and rendered active assistance in the building of the Bee Hive saloon, and after it was erected conducted a saloon therein; that he also usually accompanied Monaghan when any business was to be transacted or when a large sum of money was to be withdrawn from the bank. On the other hand, the evidence on behalf

of appellants shows that in November, 1910, Monaghan borrowed \$1900, which was used in paying a portion of the cost of construction of the Bee Hive saloon building; that during his lifetime \$1000 of this loan was re-paid, and that Monaghan attended to these transactions himself. The evidence offered by appellants also tends to show that Monaghan looked after the repairs to his buildings and employed and paid the workmen who made those repairs.

With reference to the circumstances attending the execution of the will, it was shown by the attorney who drew the will and who had attended to Monaghan's legal business for ten years, that Monaghan consulted him five or six times with reference to changing his will before the instrument in controversy was drawn and that on each occasion he came to the attorney's office alone. It was also shown by this attorney and by the two attesting witnesses to the will that no one accompanied Monaghan when he came to execute the will, and that no one was present when the will was executed except Monaghan, the two attesting witnesses and the attorney who drew the will.

The only questions presented for our determination are: (1) Is the verdict against the manifest weight of the evidence? and (2) Did the court err in admitting the testimony of Susan Monaghan? Complaint is made of the action of the court in refusing to give two of the instructions asked on behalf of the appellants, but as that matter was not assigned as one of the grounds for the motion for a new trial it is not now open for review.

The testimony on the question of undue influence is clearly insufficient to support the verdict. On the question of testamentary capacity it is evident that many of the peculiarities described by appellees' witnesses were but the maudlin actions and expressions of a drunken man. It is a grave question whether the verdict is not against the manifest weight of the evidence, even if it be conceded that all the testimony was properly admitted.



When Susan Monaghan was called as a witness and it was developed that her testimony related to the time when the marriage relation existed between her and the testator, appellants objected on the ground that she was an incompetent witness, stating as the basis of the objection (1) that she was the widow of the testator, and (2) that she was the mother of the two complainants, and thus, interested. The relationship between Mrs. Monaghan and the two complainants did not make her an interested party and constituted no objection to her testifying if she was not otherwise disqualified. It having been developed that she was called to testify concerning conversations, facts and circumstances occurring during the time the marital relation existed between her and the testator, the knowledge of which she obtained only by means of such relation, the objection that she was an incompetent witness because she was the widow of the testator should have been sustained. At common law a wife could not be a witness for or against her husband as to any matter, nor could she, either during the marriage or after its termination by death or divorce, be called as a witness to testify to communications between them or to any fact or transaction the knowledge of which was obtained by means of the marriage relation. This rule of the common law has been modified by sections 1 and 5 of the Evidence act, but neither of those sections renders the wife a competent witness except in the cases enumerated in the exceptions found in section 5 of the act. (*Schreffler v. Chase*, 245 Ill. 395.) The testimony of Mrs. Monaghan does not fall within any of those exceptions and is clearly incompetent. Her testimony upon the vital question in the case was of such a nature that it must have strongly impressed the jury, and it was prejudicial error to admit it.

For the error indicated, the decree of the circuit court is reversed and the cause is remanded.

*Reversed and remanded.*

JOSEPH M. WAGNER, Defendant in Error, *vs.* THE CHICAGO AND ALTON RAILROAD COMPANY, Plaintiff in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 2, 1914.*

1. NEGLIGENCE—*when fact of a railroad company's erection or maintenance of a semaphore pole is not material.* If a railroad company owns and controls a switch track and permits a semaphore pole to be erected and remain for several years dangerously close to the track, its liability for an injury caused by reason of the closeness of the pole to the track is not affected by the fact that the pole was not erected, owned or maintained by such company, but was erected and maintained by another company as a part of the joint interlocking system.

2. SAME—*error of judgment does not necessarily imply a want of ordinary care.* An error of judgment on the part of the conductor of a switching crew in riding on the side of a baggage car in rounding a curve on a Y-track instead of riding on the end of the car, or in not jumping from the car when he saw how close it would come to a semaphore pole near the track, does not necessarily imply a want of ordinary care.

3. SAME—*when employee's acceptance of benefits from relief fund operates as a release.* Where the contract between a railroad company and its employee provides that voluntary acceptance of benefits by him from the relief department after receiving an injury shall operate as a satisfaction of further claims against the employer on account of such injury, such acceptance, with the knowledge of the provision of the contract, operates as a satisfaction and is a bar to a subsequent suit.

4. SAME—*Federal Employers' Liability act has modified rule as to effect of acceptance of benefits.* The Federal Employers' Liability act has modified the law of this State with reference to the acceptance of benefits by an employee from the relief department of his employer by merely allowing the employer, in a suit for damages under the Federal act, to set off the sum it has contributed to its relief department that may have been paid to the injured employee.

5. SAME—*when alleged release of joint tortfeasor is not a bar.* In an action for common law negligence against a railroad company by an employee of another company which was using the defendant's tracks and was a joint tortfeasor with the defendant, if the defendant offers evidence to show that the plaintiff has re-

leased the joint tortfeasor by accepting benefits from its relief department, the plaintiff may prove, in rebuttal, that at the time of his injury the engine and cars were engaged in inter-State commerce; and in such case the release is not a bar as between the plaintiff and the joint tortfeasor, under the Federal Employers' Liability act, and cannot be availed of by the defendant.

CARTWRIGHT, C. J., and DUNN, J., dissenting.

WRIT OF ERROR to the Branch "D" Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN McNUTT, Judge, presiding.

WINSTON, PAYNE, STRAWN & SHAW, (SILAS H. STRAWN, EDWARD W. EVERETT, and J. SIDNEY CONDIT, of counsel,) for plaintiff in error.

JAMES C. McSHANE, for defendant in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

Joseph M. Wagner, the defendant in error, recovered a judgment in the superior court of Cook county against the plaintiff in error, the Chicago and Alton Railroad Company, for \$15,000 for injuries alleged to have been sustained by him while employed by the Chicago, Burlington and Quincy Railroad Company as a conductor in charge of a switching crew operating an engine and five cars over a track of plaintiff in error. On appeal the Appellate Court for the First District required a *remittitur* of \$387.09 to be entered and the judgment was affirmed as to the remainder. The judgment of the Appellate Court has been brought here for review by writ of *certiorari*.

On the trial plaintiff in error tendered a peremptory instruction, which was refused by the court. This action of the court is assigned as error, on the ground that the evidence was insufficient to charge plaintiff in error, in law, with actionable negligence or to prove due care on the part of defendant in error.

The evidence introduced on the part of the defendant in error tended to prove that he had been in the employ of the Burlington company for twenty years as a number-taker, car-sealer, car-carder, switchman, timekeeper, and for the last four years as conductor in charge of a switching crew in Chicago. He was directed to take five baggage cars of the Great Northern Railway Company, which had come to Chicago on the Burlington road, and deliver them to the Erie Railroad Company at its Fifty-fifth street yards, three or four miles distant. The cars were assembled, and in the course of the transfer over different roads the engine was pushing them over a Y-track which was a part of plaintiff in error's Grove street tracks, connecting the tracks of the Pennsylvania and the Chicago and Western Indiana Railroad Companies. This Y-track ran north-east, and the train entered it at its connection with the Pennsylvania tracks, at the south-west end, and it was going north-east to the connection with the Chicago and Western Indiana tracks. There were many tracks at the place, and there was a semaphore post sixteen feet high, four inches square and painted white, standing near the track, which had been erected and was maintained and operated by the Chicago and Western Indiana Railroad Company and was a part of the joint interlocking system. Plaintiff in error did not own or in any manner control the post or its location, and the post had been there for twelve years while cars were frequently passing over the tracks. Defendant in error was hanging on the side of the front baggage car, fifteen feet from the front end, where there was a door set back four or five inches from the side of the car, forming a recess. He was standing with his feet on the truss-iron under the bottom of the door or on a step below the door and was holding on by perpendicular grab-irons on the sides of the door. There was a controversy whether the track was straight near the semaphore or not, but the evidence for defendant in error was that it was curved and he was on the inside of the curve.

The train moved slowly over the Y and he could see the semaphore for at least one hundred feet, but he testified that it looked as if there was plenty of room until he came near the post, when he squeezed his body as tight as he could to the car, but he was struck, thrown down and permanently injured. There was room enough between the semaphore and the end of the car as defendant in error came near the post, but the chord or right line formed by the side of the car, which was sixty-five feet long, intersecting the curve brought the part of the car where defendant in error was hanging nearer to the post.

Plaintiff in error had made all repairs on the track for twelve years, employed switchmen, who made a record of all the engines and cars passing over the track, and for at least five years had rendered bills to the Burlington company for trackage of its engines and cars, including two engines and five cars in the month of the accident. There was sufficient evidence of plaintiff in error's ownership and control of the track, and the semaphore post had been in the same place for many years. If the post was in dangerous proximity to the track it was negligence on the part of plaintiff in error to continue to operate trains, or to permit their operation by its licensee, with the dangerous obstruction, and the fact that the post was not erected nor maintained by plaintiff in error would not relieve it from liability. (*Illinois Terminal Railroad Co. v. Thompson*, 210 Ill. 226; *South Side Elevated Railroad Co. v. Nesvig*, 214 id. 463.) The evidence tended to prove negligence of plaintiff in error authorizing the submission of that issue to the jury.

On the question of the care exercised by defendant in error, he testified the semaphore post was in plain sight for a considerable distance, and it was undisputed that he could have jumped off before reaching it, and it was not necessary for him to ride where he was, as there were other places of safety on the cars. A brakeman with an air-gun

or tail-hose was located at the front end of the front car and was able to apply the air and stop the train. There was evidence that defendant in error ought to be somewhere where he could signal the engineer, and the evidence tended to prove that there was room enough between the post and the end of the car, and it was within the fifteen feet that the car came too close to the post. Even if there was an error of judgment on the part of defendant in error, it would depend upon the circumstances whether it amounted to negligence, since a mistake does not in all cases imply a want of ordinary care. (*Chicago and Eastern Illinois Railroad Co. v. O'Connor*, 119 Ill. 586; *North Chicago Street Railroad Co. v. Dudgeon*, 184 id. 477.) The law does not pronounce a party to be either negligent or free from negligence under the conditions shown by the evidence, and the court did not err in submitting the issue to the jury.

The original declaration charged that plaintiff in error and the Burlington company were common carriers and engaged in inter-State commerce; that defendant in error was employed as a switchman in such commerce by the Burlington company; that plaintiff in error owned the track on which the Burlington company, at the invitation and with the knowledge of plaintiff in error, operated its engine and cars, and that defendant in error was injured by a semaphore negligently placed or permitted to be placed alongside the track. Plaintiff in error filed a plea of the general issue and a special plea denying that it owned, possessed or operated the track or the semaphore. Later two additional counts were filed by leave of court in which no mention was made of inter-State commerce, and there was no allegation that the engine or cars were engaged in such commerce but the liability charged was based on common law negligence. To the additional counts the same pleas were filed as before; also a special plea of the Statute of Limitations. The defendant in error's demurrer to the plea of the Statute of Limitations was sustained and the case

was called for trial. In the course of the trial evidence was offered on the part of defendant in error tending to prove that the engines and cars were engaged in inter-State commerce, when an objection was interposed on the ground that the question of inter-State commerce had been eliminated and the demurrer to the plea of the Statute of Limitations sustained by agreement. While this stipulation or agreement does not appear in the bill of exceptions, it does satisfactorily appear from what followed when this objection was made that such an agreement had been entered into. The evidence that had been offered on this question was then stricken out by the court and no further evidence relating to inter-State commerce was offered. Whether there was such an agreement or not is not material, so far as the case made by defendant in error in the first instance is concerned. Defendant in error had no cause of action against plaintiff in error under the Federal Employers' Liability act, as that act applies only where the relation of master and servant exists. To meet the case of defendant in error, the plaintiff in error proved that he was, and had been since 1902, a member of the relief department of the Burlington company; that the employees of that company made monthly contributions to the relief fund; that the company maintained the department and bore the operating expenses, and that he had accepted from the relief fund, as benefits, the sum of \$1231, and that \$1349.59 had been paid in his behalf for hospital bills, physicians' services, and the like. Of these amounts the Burlington company had contributed not to exceed fifteen per cent, or \$379.09,—the amount for which the Appellate Court required defendant in error to file a *remittitur*. In rebuttal defendant in error was permitted to prove that at the time he was injured the engine and cars were engaged in inter-State commerce. The court gave, at the instance of defendant in error, an instruction that if the jury found plaintiff in error guilty, then, in the assessment of dam-

ages, they should not credit the plaintiff in error with what the Burlington relief department had paid to the defendant in error or to any doctor or association on his account. The admission of this evidence in rebuttal and the giving of this instruction are assigned as error.

There can be but one satisfaction for an injury, and if defendant in error made a settlement with the Burlington company and released it from further liability, it was a release, also, of plaintiff in error from all liability, as the Burlington company was a joint tortfeasor. The contract of defendant in error with the relief department provided that the voluntary acceptance by him of benefits after receiving an injury should operate as a satisfaction of further claims against the employer on account of such injury, and it is the law of this State that such an acceptance, with the knowledge that the contract contained such a provision, operates as a satisfaction and bar to a subsequent suit for damages. (*Eckman v. Chicago, Burlington and Quincy Railroad Co.* 169 Ill. 312.) The State law in this regard has been modified, however, by the Federal Employers' Liability act as to cases where injuries are received by certain employees of an employer engaged in inter-State commerce. The Federal act provides that any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the act, shall to that extent be void, provided that in any action brought against any such common carrier under the act such common carrier may set off any sum it has contributed or paid to any insurance, relief, benefit or indemnity that may have been paid to the injured employee or the person entitled thereto, on account of the injury or death for which the action is brought. Prior to the passage of the Federal Employers' Liability act the laws of the several States were determinative of the liability of employers engaged in inter-State commerce, for injuries received by their employees while engaged in



such commerce. That was because Congress had not acted and because the subject is one which falls within the police power of the States in the absence of action by Congress. Now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded by the Federal act. *Mondou v. New York, New Haven and Hartford Railroad Co.* 223 U. S. 1; *Michigan Central Railroad Co. v. Vreeland*, 227 id. 59; *St. Louis and San Francisco Railway Co. v. Hesterly*, 228 id. 702.

Whether it had been stipulated, during the presentation of the defendant in error's case in chief, that the question of inter-State commerce was not in the case is immaterial. That stipulation simply left the case as though no such allegation had been made in the declaration. When plaintiff in error attempted to prove a satisfaction by the payment of benefits by its joint tort feisor, the Burlington company, to defendant in error, it was proper for defendant in error, in rebuttal, to show that no valid release had been given the Burlington company by him. As between defendant in error and the Burlington company the Federal Employers' Liability act clearly applied, and if, as the United States Supreme Court has repeatedly held, that law supersedes all State laws on the subject, then the release given by defendant in error to the Burlington company was not valid and would not have precluded recovery by him from that company. If it was not valid so far as the Burlington company was concerned, it was clearly invalid as to plaintiff in error and constituted no defense to this action.

The evidence in rebuttal was properly admitted. The court erred in giving the instruction complained of, but that error was cured by the *remittitur* required and entered in the Appellate Court.

Complaint is made of alleged improper remarks of counsel for defendant in error, but we perceive nothing in this record that would warrant a reversal of the judgment.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

CARTWRIGHT, C. J., and DUNN, J., dissenting:

The bill of exceptions shows that the plaintiff withdrew all questions relating to inter-State commerce for the purpose of having a demurrer disposed of and having an immediate trial, and all claims growing out of any act regulating inter-State commerce were thereby eliminated from the case. When the agreement was made known to the trial court, the evidence that had been admitted tending to prove that the engine and cars were engaged in inter-State commerce was stricken out by the court and no evidence relating to that subject remained in the record. Without the agreement the plaintiff had no cause of action against the defendant under the Federal Employers' Liability act, which only applies where the relation of master and servant exists, and to maintain an action under the act it is necessary to allege and prove the existence of that relation. The only mention made of inter-State commerce was in the original declaration, consisting of a single count, which charged that the defendant and the Chicago, Burlington and Quincy Railroad Company were common carriers engaged in inter-State commerce; that the plaintiff was employed as switchman in such commerce by the Burlington company; that the defendant owned the track upon which the Burlington company, at the invitation and with the knowledge of the defendant, operated its engines and cars, and that the plaintiff was injured by a semaphore negligently caused or permitted to be placed along the side of the track. There was no averment that the plaintiff was an employee of the defendant, but, on the contrary, it was averred that he was employed by the Burlington company, and the evidence showed that he was not an employee of the defendant, so there was neither averment nor proof constituting a cause of action under the Federal Employers' Liability act. The only cause of action alleged or proved was created by the law of this State, and, although the plaintiff could only recover under that law, the opinion

of the majority is that the defendant was rightfully denied its defense under the same law.

There can be but one satisfaction for an injury, and if the defendant was liable the Burlington company was also liable and a joint tort feisor with it. The Burlington company had been running over this track in its existing condition for many years, had obtained the right to use, and had used, it in making deliveries to other railroads, and almost every month for at least five years had received a bill rendered by the defendant for the use of it. The Burlington company was chargeable with notice of the existing conditions, and if there was a cause of action against the defendant there was a cause of action for the same injury against the Burlington company. One was owner and the other licensee, and neither one erected, maintained or controlled the semaphore. One was as much liable for an injury from its location as the other, so that a satisfaction as to one would have the same effect as to both. *City of Chicago v. Babcock*, 143 Ill. 358; *West Chicago Street Railroad Co. v. Piper*, 165 id. 325; *Wallner v. Chicago Traction Co.* 245 id. 148.

It is admitted by counsel, and was confessed by the *re-mittitur* in the Appellate Court, that the sums paid to and accepted by the plaintiff were to inure to the benefit of the defendant as a joint tort feisor with the Burlington company, and the defendant, to show a release of the cause of action, proved the following facts: The plaintiff was, and since 1902 had been, a member of the relief department of the Burlington company, and employees of that company made monthly contributions to the relief fund. The company maintained the department and bore the operating expenses, and during the years 1908, 1909 and 1910 contributed to the fund, without reimbursement, \$244,000. The plaintiff had received from the relief fund, on account of his injury, \$1231 for benefits and \$1349.50 paid for hospital bills, physicians' services, and the like, and was

still receiving similar benefits from the fund and would continue to receive them while disabled.

It is the law of this State that a voluntary acceptance by a railroad employee, after receiving an injury, of the benefits provided for in his contract of membership in the relief department of his employer, with knowledge that the contract provides such acceptance shall operate as a satisfaction of further claims against the employer on account of such injury, operates as a satisfaction and a bar to a subsequent suit for damages. This was decided in *Eckman v. Chicago, Burlington and Quincy Railroad Co.* 169 Ill. 312, following the general current of authorities in other States on the same subject. It was there held that such a contract by which an employee receives at once and without dispute or question a sum of money, perhaps less than he might prove in an action against the employer at the end of litigation, with the attending delays and expenses, and perhaps a division with attorneys, is not contrary to the public policy of the State. The facts proved by the defendant were sufficient to establish, under the law of this State, a satisfaction by the Burlington company of the plaintiff's injury and damages, and the evidence admitted in rebuttal was for the purpose of destroying that defense by means of the Federal Employers' Liability act, which gave no cause of action to the plaintiff and under which the suit was not and could not have been brought. Congress has supreme control over the subject of commerce between the several States, and no one disputes the proposition that whenever suit is brought and facts are averred which constitute a cause of action under an act of Congress relating to that subject, the act supersedes all legislation over the same subject by the States, but Congress cannot, and has not attempted to, determine what shall be the policy of a State or what its laws shall be. There is no act of Congress which would give any right of action in favor of the plaintiff against the defendant, whether

engaged in inter-State commerce or not. Congress has not legislated on that subject at all. In an action brought under the State law the defendant is as much entitled to the benefit of the law as the plaintiff. If the law of this State was good for the purpose of recovery it was equally good to establish a defense against the cause of action existing under the same law. To say that a law regulating the rights and duties of parties and giving a right of action for a violation of such rights and duties, and declaring what shall be a release of such right of action, is available for sustaining the action and not available for a defense is to destroy that equality of right which the law is intended to and must preserve. While the Federal statute supersedes the law of the State as to employer and employee when engaged in inter-State commerce, it only supersedes such law where allegations constituting a cause of action under it are made and proved. In the case of *Mondou v. New York, New Haven and Hartford Railroad Co.* 223 U. S. 1, the opinion was delivered in four cases and the right of action in each was based solely on the act of Congress. The case of *Michigan Central Railroad Co. v. Vreeland*, 227 U. S. 59, presented exactly the same condition. The proviso to section 5 of the Federal statute allowing the employer to set off any sum it has contributed to a relief benefit or indemnity fund is expressly limited to actions brought under or by virtue of the provisions of the act, and neither that proviso nor anything contained in the act relates in any way to an action brought under a State law. If the plaintiff had sued his employer, the Burlington company, and alleged that the injury occurred while the engines and cars were engaged in inter-State commerce, the Federal statute would apply and the employer could only set off against the damages the sum contributed to the relief fund, but if the plaintiff had brought this suit against the Burlington company the evidence of membership in the relief department and the receipt of benefits would have

established a satisfaction for the injury and have been a complete defense. We do not agree with the majority that a plaintiff may bring an action under the law of one jurisdiction and prevent a valid defense under that law by invoking the law of another and different jurisdiction. The cause of action having been released, we think the judgment of the Appellate Court should be reversed and the cause remanded to the superior court.

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THE UNIVERSITY CLUB OF CHICAGO, Defendant in Error,  
vs. EARL H. DEAKIN, Plaintiff in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 2, 1914.*

1. **CONTRACTS**—*when question whether default is in a vital matter is for the court.* Where there is a failure to comply with a particular provision of a contract and there is no agreement that the breach of such provision shall operate as a discharge, it is a question for the court whether the default is in a matter which is vital to the contract.

2. **LEASES**—*what provision of lease is vital.* Where a landlord leases a store room for a jewelry and art shop and inserts in the lease a provision that the lessor agrees, during the term of the lease, not to rent any other store in its building to any tenant making a specialty of selling pearls, such provision is vital to the contract, and upon a breach thereof the tenant may surrender the premises and is not liable for further rent.

3. **SAME**—*when lease constitutes a bi-lateral contract.* A lease executed by both lessor and lessee, which contains covenants to be performed by each of them, is a bi-lateral contract.

4. **SAME**—*what is not a compliance by lessor with covenant not to rent to particular class of tenants.* A covenant in a lease of a store by which the lessor agrees not to lease any other store in its building to any tenant making a specialty of selling pearls is not complied with merely by inserting in the lease of another store a provision prohibiting the tenant from making a specialty of selling pearls, and if the lessor fails to enforce such prohibition the first lessee may terminate his lease and surrender possession and is not limited to an action of damages for breach of the contract.

WRIT OF ERROR to the Branch "C" Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding.

JOHN S. GOODWIN, and JAMES B. DEVITT, (JAMES P. HARROLD, of counsel,) for plaintiff in error.

MATZ, FISHER & BOYDEN, (LAIRD BELL, of counsel,) for defendant in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

Defendant in error, the University Club of Chicago, brought suit in the municipal court of Chicago against Earl H. Deakin, the plaintiff in error, to recover rent alleged to be due under a lease. A trial was had before the court without a jury and resulted in a judgment for \$2007.66. Deakin prosecuted an appeal to the Appellate Court for the First District, where the judgment of the municipal court was affirmed. A writ of *certiorari* having been granted by this court, the record has been brought here for review.

On March 31, 1909, defendant in error leased to plaintiff in error, for a term of one year, a store room in its building at the corner of Michigan avenue and Monroe street, in the city of Chicago, at a rental of \$5000 for the year. The lease provided that plaintiff in error should use the room for a jewelry and art shop and for no other purpose. It also contained the following clause, numbered 12: "Lessor hereby agrees during the term of this lease not to rent any other store in said University Club building to any tenant making a specialty of the sale of Japanese or Chinese goods or pearls." Shortly after this lease was made defendant in error leased to one Sandberg, for one year, a room in the University Club building, two doors from the corner, at a rental of \$2500. The following provision was inserted in the Sandberg lease: "It is further distinctly

understood and agreed by and between the parties hereto that at no time during the term of this lease will the lessee herein use the demised premises for a collateral loan or pawnshop or make a specialty therein of the sale of pearls." On May 1, 1909, being the first day of the term of the lease, plaintiff in error took possession of the premises and thereafter paid the rent, in monthly installments, for May and June. During the latter part of June plaintiff in error, through his attorney, sought to obtain from defendant in error a cancellation of his lease on the ground that by leasing a room in the University Club building to Sandberg and permitting him to display and sell pearls therein defendant in error had violated the provision of plaintiff in error's lease above quoted, and that for such violation plaintiff in error was entitled to terminate the lease. Defendant in error refused to cancel the lease, and on June 30 plaintiff in error vacated the premises, surrendered the keys and refused to pay any further installments of rent. This suit was brought to enforce payment of subsequent installments of rent accruing under the lease for the time the premises remained unoccupied after June 30.

The evidence offered by plaintiff in error tended to show that Sandberg had made a specialty of the sale of pearls in connection with the conduct of his general jewelry business ever since he took possession of the room leased to him, and that plaintiff in error vacated the premises and surrendered possession because of the failure of defendant in error to enforce the twelfth clause of his lease. The evidence offered by defendant in error tended to prove that Sandberg had not made a specialty of the sale of pearls, and that when plaintiff in error first made known his desire to assign or cancel his lease he gave as his only reason that his health was failing and that he had been advised by his physician to leave the city of Chicago.

Propositions were submitted to the court by both parties to be held as the law of the case. The court held, at the



request of plaintiff in error, that the lease sued upon was a bi-lateral contract, and upon a breach of an essential covenant thereof by the lessor the lessee had a right to refuse further to be bound by its terms and to surrender possession of the premises, and that a breach of the twelfth clause of the lease would be a good defense to an action for rent if the tenant surrendered possession of the premises within a reasonable time after discovery of the breach. The court refused to hold as law propositions submitted by defendant in error stating the converse of the propositions so held at the request of plaintiff in error. The court properly held that the lease in question was a bi-lateral contract. It was executed by both parties and contained covenants to be performed by each of them. The propositions so held with reference to the effect of a breach of the twelfth clause of the lease also correctly stated the law. By holding these propositions the court properly construed the twelfth clause as a vital provision of the lease and held that a breach of that provision by the lessor would entitle the lessee to rescind. Where there is a failure to comply with a particular provision of a contract and there is no agreement that the breach of that term shall operate as a discharge, it is always a question for the courts to determine whether or not the default is in a matter which is vital to the contract. (*City of Belleville v. Citizens' Horse Railway Co.* 152 Ill. 171; *People v. Central Union Telephone Co.* 232 id. 260.) While there was no provision in this contract that plaintiff in error should have the option to terminate it if the terms of the twelfth clause were not observed, it is apparent that it was the intention of the parties to constitute this one of the vital provisions of the lease. It was concerning a matter in reference to which the parties had a perfect right to contract, and it will be presumed that plaintiff in error would not have entered into the contract if this clause had not been made a part of it. It is such an essential provision of the contract that a breach

of it would warrant plaintiff in error in rescinding the contract and surrendering possession of the premises.

The court was not asked to make any finding of fact, and there is nothing in the record to indicate that the judgment is based upon any finding of fact. Whether Sandberg had, in fact, made a specialty of the sale of pearls was one of the controverted questions in the case. One of the propositions submitted by defendant in error and held by the court, stated that the conduct of a general jewelry business was not "making a specialty of the sale of pearls," within the meaning of the words quoted as they were used in the twelfth clause of plaintiff in error's lease. This can not be construed as a holding that Sandberg did not, in fact, in addition to his conduct of a general jewelry business, make a specialty of the sale of pearls.

The following proposition was submitted by defendant in error and held by the court as the law of the case:

"That plaintiff performed all the obligations imposed upon it by its covenant that it would not rent any other store in its building to a tenant making a specialty of the sale of pearls, by incorporating in its lease to the second tenant that said second tenant should not make a specialty of the sale of pearls in the demised premises."

From a consideration of all the propositions of law held and refused, it appears that the judgment of the trial court was reached from the application of the proposition just quoted to the facts in the case. The court erred in holding this proposition as the law. By covenanting with plaintiff in error not to rent any other store in this building, during the term of plaintiff in error's lease, to any tenant making a specialty of the sale of pearls, defendant in error assumed an obligation which could not be discharged by simply inserting in the contract with the second tenant a covenant that such tenant should not make a specialty of the sale of pearls. It was incumbent upon it to do more than to insert this provision in the second lease. By the

terms of its contract with plaintiff in error it agreed that no other portion of its premises should be leased to any one engaged in the prohibited line of business, and if it failed to prevent any subsequent tenant from engaging in the business of making a specialty of the sale of pearls, it did so at the risk of plaintiff in error terminating his lease and surrendering possession of the premises.

This precise question has never been passed upon by this court, so far as we are able to ascertain. Defendant in error cites and relies upon *Lucente v. Davis*, 101 Md. 526, which supports its theory. We cannot yield our assent to the doctrine there announced. Defendant in error cannot escape its obligation by the mere insertion of a clause in the lease with the second tenant prohibiting him from engaging in the line of business named. Plaintiff in error contracted for the exclusive right to engage in this particular business in that building. There was no privity between him and Sandberg, and he was powerless to enforce the provisions of the contract between defendant in error and Sandberg. It is idle to say that an action for damages for a breach of contract would afford him ample remedy. He contracted with defendant in error for the sole right to engage in this specialty in its building, and if defendant in error saw fit to ignore that provision of the contract and suffer a breach of the same, plaintiff in error had the right to terminate his lease, surrender possession of the premises and refuse to further perform on his part the provisions of the contract.

For the errors indicated the judgment of the Appellate Court and the judgment of the municipal court are reversed and the cause is remanded to the municipal court for a new trial.

*Reversed and remanded.*

HELEN W. S. JOHNSON *et al.* Appellants, *vs.* THE NORTHERN TRUST COMPANY *et al.* Appellees.

*Opinion filed October 16, 1914—Rehearing denied Dec. 3, 1914.*

1. APPEALS AND ERRORS—*when decree is final.* A decree which disposes of all the substantial rights of the parties in the subject matter of the litigation and adjudicates the title to the property and the right to its possession, leaving nothing more to be done than to take an account, is final and appealable.

2. LEASES—*effect where lessee assigns lease to supposed corporation having no authority to organize.* Where the lessee of real estate assigns the lease to a supposed corporation the organization of which is void for want of statutory authority to incorporate, the assignment is void and the original lessee remains bound; but the stockholders of the supposed corporation whose money was expended in the erection of a building on the land acquire an equitable interest in the property by virtue of the payment of the money and the performance of the covenants which constituted the consideration for the lease to the original lessee.

3. SAME—*association of individuals to purchase a leasehold estate and erect building is not illegal.* An association of individuals for the purpose of purchasing a leasehold estate and erecting a building is not prohibited by law or contrary to public policy, and the mere fact that the association is illegal because it took the form of a corporation not authorized by law does not work a forfeiture of the money invested in the enterprise when the organization of the corporation is held void, but the property assembled by such individuals in their associated capacity is still their property, in the possession and use of which equity will protect them.

4. SAME—*what constitutes surrender of lease.* A surrender of a lease is the yielding up of the estate to the landlord so that the leasehold interest becomes extinct by mutual agreement between the parties, and it may be in express words or by operation of law without express surrender, when the parties do some act which implies that both have agreed to consider the surrender as made.

5. SAME—*not every change of possession is a surrender.* A surrender of a lease may take place by operation of law, but not every change of possession, though actual and continued, amounts to such surrender.

6. SAME—*what does not constitute a surrender.* The valid assignment of a lease by the lessee, consented to by the lessor, and the acceptance of rent from the assignee, do not, of themselves, constitute a surrender of the lease.

7. SAME—*when the right to object to assignment of a lease is waived.* Where an attempted assignment of a leasehold interest in trust property by the lessee is assented to by the lessor and the beneficiaries under the trust, the right to forfeit the lease or object to the assignment because it did not come within the provisions of the lease is waived.

APPEAL from the Branch "B" Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding.

SCOTT, BANCROFT & STEPHENS, and STEWART JOHNSON, (EDGAR A. BANCROFT, REDMOND D. STEPHENS, and LESTER L. FALK, of counsel,) for appellants.

HARRY S. MECARTNEY, for appellee Edward A. Shedd.

JAMES HAMILTON LEWIS, (JOHN C. PATTERSON, *pro se*,) for appellee John C. Patterson.

JUDAH, WILLARD, WOLF & REICHMANN, for the appellee the Northern Trust Company.

Mr. JUSTICE DUNN delivered the opinion of the court:

On July 29, 1910, Helen W. S. Johnson filed a bill in equity in the superior court of Cook county, which was afterward amended, Stewart Patterson joining as complainant in the amended bill, the prayer of which was for an accounting of the rents and profits of certain real estate situate at the north-west corner of State and Washington streets, in the city of Chicago, upon which is a twelve-story building known as the Stewart building, the appointment of a receiver of the rents and profits of such building, the delivery of the possession and control thereof to the Northern Trust Company, the cancellation of a certain lease of the premises, and a decree that the title thereto and the sole right of possession and control are in the Northern

Trust Company, as trustee, for the benefit of the complainants and the other beneficiaries named in a certain deed of trust of said premises to that company. On the day of the filing of the original bill the Northern Trust Company filed its bill, also in the same court, praying for the instruction of the court as to its rights and duties as trustee. All the beneficiaries under the trust deed, Herman H. Kohl-saat, the original lessee, Edward A. Shedd, who claimed to have succeeded in equity to the rights of the lessee, and others, were parties to these bills. Answers and cross-bills were filed, the causes were consolidated, and a hearing resulted in a decree substantially in accordance with the prayer of the amended bill of Helen W. S. Johnson and Stewart Patterson, finding that there was a surrender of the lease by operation of law and that the Northern Trust Company held the title subject only to the terms and conditions of the deed of trust to it, and retaining jurisdiction of the cause for the purpose of an accounting. On appeal by Edward A. Shedd the Appellate Court for the First District reversed this decree and remanded the cause, with directions to dismiss the bill of Helen W. S. Johnson and Stewart Patterson and to enter a decree quieting the title of Shedd to the leasehold estate. Helen W. S. Johnson and Stewart Patterson have appealed from this judgment, the Appellate Court having certified that the cause involves questions of such importance that it should be passed upon by the Supreme Court.

John C. Patterson, one of the defendants who filed a cross-bill to which a demurrer was sustained, moved in the Appellate Court to dismiss the appeal on the ground that the decree was not final, and has assigned cross-error on the action of the court denying the motion. It was properly denied, for the decree disposes of all the substantial rights of the parties in the subject matter of the litigation and adjudicates the title to the property and right to its

possession, leaving nothing more to be done than to take an account.

The leasehold estate involved in this case has been the subject matter of litigation in three cases which have been prosecuted to final judgment in this court under the title of *Patterson v. Northern Trust Co.* 230 Ill. 334, 231 id. 22, and 238 id. 601. Those Reports contain a statement of all the facts in regard to the creation of the leasehold estate and the subsequent action of the parties interested in regard to that estate, on the basis of which the rights of the parties were adjudicated. In those cases the validity of the incorporation of the Merrimac Building Company, the supposed assignee of the leasehold estate, was not in issue, but about the time of the last decision the circuit court of Cook county rendered a judgment of ouster upon an information filed against the appellees, Edward A. Shedd and his associates in the supposed corporation, holding that no law existed for the formation of a corporation for the purposes for which the Merrimac Building Company purported to be organized, and that judgment was afterward affirmed by this court and the Supreme Court of the United States. (*People v. Shedd*, 241 Ill. 155; *Shedd v. Illinois*, 217 U. S. 597.) It is this judgment which has given rise to the present litigation. All questions in regard to the forfeiture of the leasehold estate and the validity of its assignment were decided in the previous cases. The appellants do not claim a forfeiture for non-payment of rent, but they insist that, the supposed assignee of the lease having no existence, the formal assignment vested no title but was void and of no effect. It is then argued that the lessee having completely abandoned the premises after the execution of the assignment and the owners of the fee having dealt with other persons in possession of the building as the only tenants, the acts of the parties were incompatible with the continued existence of the relation of land-

lord and tenant, and therefore a surrender of the lease resulted by operation of law.

The lease was made on May 1, 1893, by George M. Pullman and Watson Matthews, trustees, for the term of 102 years at a graduated rental, beginning with \$47,350 a year, reaching \$75,000 a year on May 1, 1906, and continuing at the latter rate for the remainder of the term. It provided for the remodeling of the building on the premises or the construction of a new building. On April 20, 1896, the certificate of the Secretary of State of the organization of the Merrimac Building Company was issued, and on April 30, 1896, an assignment of the leasehold estate was executed to that company. A new building was constructed in accordance with the terms of the lease, and on April 2, 1897, a second assignment of the lease was made to the Merrimac Building Company, and the lessors, the trustees, formally consented, in accordance with the terms of the lease, to both assignments. In December of that year the trustees conveyed the legal title in the fee to the beneficiaries, and they in turn conveyed the premises in trust to the Northern Trust Company, subject to the leasehold estate, which was recited to have been "duly assigned and conveyed by said lessee therein, said Herman H. Kohl-saat, to the Merrimac Building Company, a corporation organized and existing under the laws of the State of Illinois, which said Merrimac Building Company is now the owner of said leasehold estate." The Merrimac Building Company continued to be recognized and was dealt with in all respects as the assignee and owner of the leasehold estate by the trustee and all the beneficiaries until the judgment of ouster. Controversies arose between John C. Patterson, one of the beneficiaries, who owned a life estate in one-twelfth of the fee, and the Northern Trust Company, the trustee, in regard to the accounts of the trustee and its action in regard to the forfeiture of the lease for non-payment of rent and in other particulars, and the



litigation which has been referred to arose out of these controversies. Three of the other four beneficiaries, who owned three-fourths of the fee, (the appellant Helen W. S. Johnson being one of the three,) participated actively in the litigation in opposition to the claims of John C. Pat-teron, insisting that they were not tenable in law and that the continuance of the leasehold estate was beneficial to the trust estate. Edward A. Shedd had nothing to do with the attempted organization of the Merrimac Building Company and no interest in it or in the leasehold estate before 1905. His interest was acquired by the purchase of bonds issued by the Merrimac Building Company, as appears in the report of the first of the Patterson cases, as well as of the stock issued, and at the commencement of this suit he held assignments of all the supposed stock and bonds of that supposititious corporation. Kohlsaas made to Shedd and Albert M. Johnson a quit-claim deed of the leasehold estate on January 30, 1905, and Johnson afterwards quit-claimed his interest to Shedd. From 1905 Shedd acted as president and his brother as vice-president of the Merrimac Building Company until the decision of the Supreme Court of the United States, on May 31, 1910, affirming the judgment of ouster, and as such had possession and control of the building. Since that time Edward A. Shedd has continued in possession and new leases have been made in his name as an individual lessor.

It must be conceded that the attempted assignments to the Merrimac Building Company were ineffectual to convey the leasehold estate to it. Since there was no grantee capable of taking the estate, the instruments purporting to convey it were void and the title remained in Kohlsaas. The Merrimac Building Company acquired no title by virtue of Kohlsaas's deeds, but the stockholders who subscribed and paid for the stock did acquire an equitable interest in the property. (*Walker v. Taylor*, 252 Ill. 424.) This equitable interest arose, not out of the deeds, but out

of the payment of the money and the performance of the covenants which constituted the consideration for the lease. The construction of the building, which was the principal inducement and consideration for the execution of the lease by the lessors, was accomplished by means of the funds of the illegal association known as the Merrimac Building Company, obtained from the subscriptions to its supposed stock and the issue of its supposed bonds. It was not intended by the lessors, the lessee or the so-called stockholders that the money of the stockholders or their performance of the covenants of the lease should inure to the benefit of the lessors or the lessee except in accordance with the terms of the lease. An association of individuals for the purpose of purchasing the leasehold estate and constructing a building thereon was not illegal. Such a purpose is not prohibited by law or contrary to public policy. The association was illegal only because it took the form of an incorporation not authorized by law, but it was not criminal. The law denounced no such penalty against such association as forfeiture of the money or property invested in the enterprise. The law was satisfied when the individuals were removed from and ceased to usurp the franchise of being a corporation. The property which they had assembled in their associated capacity was still their property, in the possession and use of which a court of equity could and would protect them. Having paid for it they were in equity entitled to enjoy its use.

There was no surrender of the lease by operation of law. There certainly was no intention on the part of any person connected with the lease that it should be surrendered. The lease authorized the lessee to assign it, but not without the written consent of the lessors, which they were bound to give in conformity with certain prescribed conditions, but an assignment was expressly prohibited to any corporation not having the power and authority, under the laws of its organization and the laws of Illinois, to accept

such assignment. The attempted assignment was supposed by all concerned to comply with the conditions of the lease, but all now concede that it did not but was void. It had, therefore, no effect upon the rights of the parties. Kohlsaat still continued bound for the payment of the rent and the performance of the other covenants. He put the association known as the Merrimac Building Company in possession, and the managers of that association thereafter paid the rent and performed the covenants of the lease and were looked to by the lessor for that purpose. By the terms of the lease an assignment complying with its conditions would have released Kohlsaat, but this was not such an assignment. He remained liable, afterward as before, for the rent and the lease was not affected. Disregarding entirely, as we must, the deeds of Kohlsaat which purported to convey the leasehold to the Merrimac Building Company, we find that Kohlsaat placed certain persons in possession of the leasehold estate, who, not as volunteers but pursuant to an invalid agreement, performed at great expense the covenants of the lease. A surrender of a lease may take place by operation of law, but not every change of possession, though actual and continued, amounts to such surrender. The valid assignment of a lease by the lessee, consented to by the lessor, and the acceptance of rent from the assignee, do not, of themselves, constitute a surrender of the lease. (*Grommes v. St. Paul Trust Co.* 147 Ill. 634; *Barnes v. Northern Trust Co.* 169 id. 112.) A surrender is the yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties. It is either in express words by which the lessee manifests his intention of yielding up his interest in the premises, or by operation of law, when the parties, without express surrender, do some act which implies that they have both agreed to consider the surrender as made. (*Beall v. White*, 94 U. S. 382.) Here the intention to discharge Kohlsaat was based upon an assignment in con-

formity with the lease. No such assignment had been made. The assignment was void, and as between the parties Kohlsaas remained bound by the lease although the persons who supposed themselves stockholders in the Merrimac Building Company were equitably entitled to the benefit of it. Their equity is based upon the good faith of the transaction. Their possession was acquired under the honest belief that the Merrimac Building Company had obtained title to the property. Their money was expended in the construction of the building on the premises and in complying with the covenants in the lease in the belief that they were adding to the value of their own property. It would be highly inequitable to hold that the acts of the parties, based upon what all regarded as a valid assignment of the lease, really worked the entire destruction of the leasehold estate, and thus to appropriate to others the property and money of the supposed stockholders, which has manifestly added to the permanent value of the estate and was invested without any suspicion of any infirmity in their title.

The certificates of stock issued in the name of the Merrimac Building Company were not evidence of the ownership of stock in a corporation but they indicate the proportionate contributions made to the resources of the association. The persons making such contributions were equitably interested in the property for the acquisition of which they were used. Their entire interest has become vested in the appellee Shedd. The leasehold estate, which remained in Kohlsaas in spite of his attempted conveyance, was conveyed by him on January 30, 1905, to Shedd and Johnson, and Johnson later conveyed his interest to Shedd. The attempted assignment of the lease by Kohlsaas was assented to by the lessors and the beneficiaries under the trust, and the right to forfeit the lease or object to its assignment has been waived. (*Webster v. Nichols*, 104 Ill. 160.) Shedd must be regarded as the owner of the lease-

hold estate, and the Appellate Court rightly held that his title should be quieted.

The appellee Shedd has assigned cross-errors on the failure of the Appellate Court to direct the superior court to decree to said appellee, besides costs, his reasonable expenses and attorneys' fees incurred in the cause, and his counsel has filed an extended argument asking us to set a precedent in practice based upon the trivial character of the litigation. So far as this question is concerned the triviality is not in the character of the litigation. The assignments of cross-errors are overruled.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. CHRISTIAN P. BERTSCHE *et al.* Plaintiffs in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 3, 1914.*

1. CRIMINAL LAW—*confidence game statute is not void as being uncertain.* The fact that the means used in swindling may be many and varied does not warrant holding the confidence game statute void as being uncertain.

2. SAME—a bank draft or a delivered check is property. A check in the hands of the maker is not property, because delivery is an essential part of the complete execution of the instrument, but a delivered check or bank draft is property.

3. SAME—*fact that a swindling scheme takes form of business transaction is not material.* Where the evidence shows that the defendants took advantage of the confidence reposed in one of them by a third person and defrauded the latter of her property by a swindling scheme, it is no defense that such scheme took the form of a business transaction.

4. SAME—*no physical means of deception are necessary to constitute the confidence game.* In Illinois no physical means of deception, such as the use of bogus checks or other means, instruments or devices, are necessary to constitute the confidence game, but it is sufficient if the swindling operation is carried out by means of false verbal representations, pretensions or statements.

WRIT OF ERROR to the Criminal Court of Cook county ;  
the Hon. CHARLES M. WALKER, Judge, presiding.

BENEDICT J. SHORT, for plaintiffs in error.

P. J. LUCEY, Attorney General, and MACLAY HOYNE, State's Attorney, (C. H. LINSOTT, of counsel,) for the People.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court :

An indictment against the plaintiffs in error, Christian P. Bertsche, *alias* B. P. Christy, and Charles T. Crane, *alias* James Ryan, was returned into the criminal court of Cook county. It contained three counts, and in the first charged that the defendants obtained from Hope L. McEldowney United States treasury notes, bank bills and silver of the value of \$15,000, and a draft of the value of \$12,500, by means and by use of the confidence game. The second count charged a conspiracy to unlawfully obtain money and property of Hope L. McEldowney of the value of \$15,000 by means and use of the confidence game, and the third count charged the larceny of a draft of the value of \$12,500 and lawful money of the value of \$15,000. Upon the trial the jury returned a verdict applicable to the first count, finding each of the defendants guilty of the confidence game in manner and form as charged in the indictment, and the court sentenced the defendants in accordance with the verdict.

Money and drafts amounting to \$15,500 were obtained from Hope L. McEldowney by the defendant James Ryan by fraud and deceit, and the fact was not disputed. He was the principal actor in the fraudulent scheme by which the money and drafts were obtained, and the defendant Christian P. Bertsche was charged as an accessory before the fact and therefore a principal. The evidence of the

transactions of the defendant James Ryan with Hope L. McEldowney was, in substance, as follows:

In January, 1913, Hope L. McEldowney, a widow, forty-two years old, arrived in Chicago from Davenport, Iowa, where she had graduated from a school of chiropractics, which professes to teach a method of curing disorders by a treatment of the spine. She saw in the *Sunday Examiner*, a newspaper published in Chicago, the following advertisement of the defendant James Ryan under the style of Prof. C. T. Crane:

"Prof. C. T. Crane, clairvoyant, permanently located and favorably known in Chicago for the past eleven years for his marvelous foresight and accurate advice upon the problems of life in their multifarious details, such as love, courtship, marriage, investment, speculations, patents, insurance, journeys, changes, property, etc. Positively re-unites the separated, causes speedy marriages, removes evil influences, develops mediums, etc., and immediately brings about every ambition and wish, and saves you the saddest words that pen ever wrote: 'It might have been.' Full and complete reading to-day, only 50 cents. Hours 10:00 to 6:00 P. M. 204 North State street, corner of West Lake street, one block north of Marshall Field's. All 'L' trains stop at the door."

She went with a friend, Nellie Hoople, to the place named in the advertisement and was ushered by a doorman into a reception room, where she found a number of ladies waiting for the professor to solve the problems of life by his marvelous foresight, and after a time she was admitted to the defendant. By his direction she wrote a number of questions on a slip of paper. She was in doubt whether to locate in California or Florida, and one of the questions asked for his advice which it would be best to do. The paper was folded up and the professor was supposed not to see the writing, but he did see it by some method, as he admitted, and another fortune teller testified that they saw the questions by switching the papers. He held the paper to his forehead and answered the questions. He said the trip to California would not be successful, that she would not be happy, and that Chicago would be a bet-

ter place to make money. He asked her if it was really necessary for her to practice chiropractics as a livelihood, and she told him it was not, and he ascertained that she had considerable property, amounting, as he said, to \$125,000 or \$130,000. He told her that she should be a very happy and successful woman, but an evil influence was following her and he would like to remove that. He charged her fifty cents for what he called the "reading" and \$20 for removing the evil influence. He asked her to come to his office and talk about it with him, and on the second visit he asked her about her investments. She had lived at West Salem, Wisconsin, where she had been assistant cashier in a bank. She told him that she was getting five per cent on her mortgages, and he said that he could invest her money and make a great deal more. He gave her a book on psychology and mental thought, and she reported afterward that she was progressing and feeling much better. She called on him frequently and he was very attentive to her and their relations became very intimate. He telephoned her many times a day and asked her how she was feeling, and she would tell him that she was feeling better. She saw him nearly every day, and he sent her flowers, books and bon bons and presented her with a diamond ring. At first she stopped at a hotel, where he called on her very often and took her to dinners and suppers, and he also gave her daily automobile rides and took her to theaters. After a time she changed her location from the hotel to rooms at 2507 Michigan avenue, where the same relations existed between them. Soon after the acquaintance was formed he told her that his father and he had a broker on the board of trade who supervised all their investments, and he would like to prove to her how easily he could make a good profit on a small sum. She gave him a draft for \$400 drawn by the LaCrosse County Bank of West Salem on a bank in Chicago and \$100 in cash. He made no investment, but in about a week brought her \$121



and said that was the result of the investment of the \$500. About February 13, 1913, she gave him another draft, for \$2500, to be invested on the board of trade. He said they never took money without giving collateral of some sort, and on each occasion gave her his note for the amount received. Some days later he told her that Murray, who was in high esteem and employ of James J. Hill, of the Great Northern railroad, was in Chicago and in close conference with himself and his father for three days, and had told them about some bonds and advised them to get Great Northern railroad bonds, and that he and his father were going to take a good many of them and they would be a better investment for her money than on the board of trade. He showed her a bundle of bonds which he said were worth about \$7500 and belonged to him. He said that he and his father had helped a great many people and had done a great deal of good in the world; that God had given him a marvelous gift and he had never abused that gift, and if he did anything wrong the gift would be taken from him. He said he lived with his father and sisters and brothers on Sheridan road and was a single man, all of which was false. On the representation that he would buy bonds for her she procured another draft from the same bank for \$12,500 and gave it to him on March 3, 1913, to buy the bonds. The bonds did not come, and he showed her what purported to be a telegram from New York that the man authorized to sign the bonds was attending the inauguration at Washington, and as soon as the man returned the bonds would be signed and sent to him. He had proposed marriage to her, and it was agreed that they should go to New York and be married. He turned the draft for \$12,500 over to his confederate, and he started with her ostensibly for New York, but on the way told her that his father had requested him to stop in Indianapolis to attend to an estate worth about \$400,000 in which he was interested. They stopped at Indianapolis

and stayed at a hotel as husband and wife for two days while he claimed that he was trying to find a judge, and he then said that there was important business for him back in Chicago and they would have to go back and start again the next week for New York. They left Indianapolis the evening of March 6 and took a compartment and arrived in Chicago on the morning of March 7. She then went to West Salem and had some news which caused her to come back to Chicago, when he had disappeared and the rooms at 204 North State street were vacant. While he had her away at Indianapolis the draft was collected, and it is a fair inference that it was a part of the scheme that she should be absent from Chicago at that time. On April 18, 1913, Ryan was arrested in Mannsville, Wyoming. He resisted extradition, and Mrs. McEldowney went to Wyoming to identify him in a *habeas corpus* proceeding. At the hearing he testified that he had never lived in Chicago, that he was never there more than two days at a time and that he never went by the name of C. T. Crane. He was remanded to the sheriff and sued out a writ of *habeas corpus* from the Supreme Court of the State, and there gave the same testimony, which is admitted to have been false. He never made any investments of the money or the proceeds of the drafts and never intended to, but claimed that he gave the drafts to his brother, Frank Ryan.

The testimony of the defendant Ryan did not tend to relieve him of the charge made against him, although he denied some of the statements of Mrs. McEldowney. He did not deny obtaining the money or the drafts or that he disposed of them as claimed, but testified that he told Mrs. McEldowney that he was married but he and his wife were not congenial, and she asked him when his wife was going to get a divorce, so that they could be married as they had agreed. In fact, he was living with his wife in Chicago at the time and there was no intention of having a divorce. He testified that he read the questions that

Mrs. McEldowney wrote on the paper, and he gave the same account of their relations as she did. He said that he took dinner with her at her hotel thirty or forty times in January and February, and she told him he was spending too much money with her and suggested that she pay half the expenses and gave him the first \$500 on that account. He said that she asked him if his wife was holding out for a money consideration, and gave him the draft for \$2500 to settle with her and to make arrangements for a divorce and he was to go to Wyoming to see his wife for that purpose, and if there was any money left the balance was to be used in a business venture of clairvoyancy and chiropractics. He said that she gave him the draft for \$12,500 for investment by his brother in a copper mine in Mexico. According to his own account the draft for \$2500 was obtained by falsehood and fraud, and, of course, the story about attempting to make an arrangement for a divorce was inconsistent with the fact that he agreed to go to New York to be married, and started for that pretended purpose, when he had been living with his wife in Chicago.

There was much other evidence which was objected to, but it was competent, as against the defendant Ryan, to show guilty knowledge and intent. (*DuBois v. People*, 200 Ill. 157; *Jurelich v. People*, 223 id. 484; *People v. Weil*, 244 id. 176.) It was also competent as against the other defendant, Christian P. Bertsche, to show such knowledge and intent, and also to prove that he aided, abetted and assisted the commission of the crime. He took the drafts obtained from Mrs. McEldowney and collected them, and his defense was that they were cashed by him in the ordinary course of business and not as a party or participating in the crime. He kept a saloon near the city hall, and testified that he cashed drafts for from \$3000 to \$7000 every day, and on pay-day cashed from \$15,000 to \$20,000 for pay of policemen and city hall employees, and

that he had nothing to do with the fortune-telling business. The saloon was headquarters for a number of fortune tellers with whom Bertsche was connected and who had a code which he understood. The place where fortune tellers operated was called a "store;" a prospective client a "book;" a victim who was doing business was called a "38;" and "3" meant the police. Frank Ryan, a brother of the defendant James Ryan, was one of the fortune tellers operating under the name of Robert Milton at 1316 Michigan avenue, in the house owned by Mrs. Eisner, and the defendant James Ryan, who had been operating in other places, came to Chicago and went to work at this place under the same name in August, 1912, and operated there until some time in October. During that period Eddie McCabe and one Collins also worked there under the same style. Bertsche repeatedly visited the place and looked over the card index of persons who visited the professors, and he was always there on Saturday night and discussed the amount of business being done, the matter of advertising, and at one time money was counted out on the table and Bertsche put part of the money in his pocket. Bertsche attended a dinner at Mrs. Eisner's where all the fortune tellers were present and their business was the subject of discussion. A doorman who came to Chicago in December, 1912, worked for a fortune teller named Wagg, operating as Prof. Salisbury at 1710 Michigan avenue but whose real name was Charles Durnback. The doorman made daily reports to Bertsche of the work of Wagg as a fortune teller, and when Wagg moved out one Long moved in under the same name of Prof. Salisbury, and the doorman made daily reports to Bertsche concerning Long's business. Walter Russell, a fortune teller, operated in Chicago from September 1, 1912, to about December 20, at 1128 Michigan avenue. Bertsche arranged for him to come to Chicago and promised to have a "store" for him when he arrived. He took the name of Stone and suc-

ceeded David K. Ross, who moved out leaving the furniture, and Russell moved in, taking the place just as Ross left it. This place was owned by Miss Quan, and Bertsche told Miss Quan he would put a professor in her place and would pay the same rent as the others paid, and said it was a pity to leave that place empty as it was so good for the suckers,—they tumbled right in. He brought a Prof. Snow to Miss Quan on January 2, 1913. The fortune teller Russell had just vacated the place. Russell undertook to operate on his own responsibility and Bertsche assaulted him, and after knocking him down took a pair of hair clippers and cut a cross in the hair on his head, and told Russell that he would show him that he couldn't go over his head and start in business without his consent.

James Ryan left 1316 Michigan avenue the first part of November, 1912, and established the office at State and Lake streets, and the following evidence shows the method of the fortune tellers with whom Bertsche operated: Mrs. A. M. Case, a widow over seventy years old, in the employ of the post-office, visited the defendant Ryan in January, 1913, and he told her his story about board of trade investments. She told him that she had \$500 which she had saved for admission to an old folks' home, where they would take care of her when she could no longer work, and she could not afford to lose it. She gave him a manuscript of a book written by her husband concerning the inhabitants of the other world, which he agreed to have published, and he told her that he had communication with the spirit of her departed husband and he would invest the \$500 for her so as to make large earnings. She gave him the \$500, which he appropriated to himself. Mrs. Thomas, in the latter part of October, 1912, went to the defendant Ryan for a reading, and he had her write questions which he answered and asked her if she had any money. He said he would make her successful and act like a brother to her, which she thought would be fine,

and so she gave him \$500, and he afterward told her that the interest was \$130, but as she didn't need it she left it with him and drew \$370 from the bank to make it \$500. She gave him in all \$1000 and never got any returns. Mary E. Rapp, a widow, visited the rooms at 1316 Michigan avenue and wrote questions on a piece of paper. Frank Ryan told her there was an evil influence giving her troubles and losses and charged her \$25 to remove the evil influence. He found that she had money and proposed investments, and she gave him a draft for \$1000, which was cashed in the presence of Bertsche by the defendant James Ryan. She later gave Frank Ryan more money, and finally sold her farm and gave him a draft for \$7500 to be invested. He gave her at different times \$90, \$110 and \$225 as earnings on her money but she was swindled out of the rest. Nellie Rosenquist about February 1, 1913, gave Frank Ryan \$1000 which he said he wanted to put some good luck into, and that was the last she saw of him. Carrie Vanderberg, a clerk in a baker shop, visited the defendant in January, 1913, and he told her to concentrate every night at a certain hour so he could get more into her head. She gave him \$310.50 to invest in stocks and never got any stocks and was cheated out of it. Bert Pyle visited the defendant Ryan at 1316 Michigan avenue and gave him \$400 and afterward gave \$200 to Frank Ryan. An investment was to be made in stocks but Pyle received no stocks, and when he went back in February, 1913, he found no one but a negro, and it was claimed that the money had been invested in a mine in Mexico. John Weick, a laborer, went to the place at 1316 Michigan avenue and gave one dollar for a reading. He wrote questions, and the professor put the paper to his head and taking Weick by the hand said he would help him out. Weick was out \$25 for that service, and also handed over \$306 to be invested in a mine in Colorado.

Bertsche was at 1316 Michigan avenue when Mrs. Rapp was there, and he took her card out of the case and gave it to Milton. He was in the habit of looking after the card case and index box and standing outside of the door when persons were having their fortunes told, saying that it made him laugh to hear the fools talk. Bertsche paid rent for rooms which he sub-rented to fortune tellers, and when James Ryan proposed coming to Chicago, in August, 1912, Bertsche and Frank Ryan discussed the advisability of permitting James to operate. Russell paid Bertsche \$300 the first month, \$350 the next and \$400 the next and ten per cent of the profits, and his predecessor, Ross, had paid the same amounts. James and Frank Ryan were very frequently at Bertsche's place, and Bertsche often inquired of the doorman as to the number of people who had called, and if any of the suckers were coming back, and if any officers came. At the last Bertsche said that it didn't look as though he would be able to keep the place open more than a couple of days; that Jimmy's big "38" would soon be put over and they would close the "store." Mrs. McEldowney lost her draft on March 3, and as soon as it was collected the business was closed, so that undoubtedly the big "38" meant her. Bertsche cashed the first draft of \$400 which Mrs. McEldowney gave the defendant Ryan, at a north side bank in Chicago, and it had upon it a prior endorsement, which Bertsche on the trial admitted was fictitious. On the same day that the draft for \$12,500 was obtained Bertsche opened an account with a bank where he caused himself to be introduced under the fictitious name of B. P. Christy, and he gave a false address as his residence. He deposited the draft for collection, and within three days, as soon as the draft was collected, he withdrew the money, closed the account and went to Kansas City with the Ryans. The evidence left no doubt as to the guilt of both defendants.

It is argued that the confidence game statute is void because uncertain, but the contrary has been repeatedly held ever since the enactment of the statute. No more certain definition could be given than that method of swindling called the confidence game. The means that may be used are different and varied, but that fact no more renders the statute uncertain than the different means employed to gain entrance to a building make burglary uncertain or the various means by which death may be caused render the crime of murder uncertain. *Morton v. People*, 47 Ill. 468; *Maxwell v. People*, 158 id. 248; *Graham v. People*, 181 id. 477; *People v. Clark*, 256 id. 14; *DuBois v. People*, *supra*.

We do not understand what possible connection the fourteenth amendment to the Federal constitution has with this case or the power of the State to define and punish crime.

One error assigned is that two separate and distinct offenses were charged in the first count of the indictment and therefore the motion to quash the indictment should have been sustained, and under the same head in the argument it is said that there is a fatal variance in the record. The count referred to by counsel, and under which the defendants were convicted, charged but one offense, consisting of a single transaction at a certain date. When different offenses were proved at different dates the defendants might have asked the court to require the prosecution to elect upon which it would rely, but that was not done. The evidence showing distinct transactions did not create a variance, since the date alleged was immaterial.

It is urged that no crime was proved because the drafts were not property. It would make no difference if that were so, for the reason that the defendants obtained \$100 in cash. The drafts, however, were property. They were domestic bills of exchange drawn by one bank upon another and were in the hands of the payee. A check in the



hands of the maker is not property, because delivery is an essential part of the complete execution of the instrument, (*Lory v. People*, 229 Ill. 268; *People v. Warfield*, 261 id. 293; 3 Ruling Case Law, 859;) but a delivered check or draft is property. *Goldgart v. People*, 106 Ill. 25.

The evidence shows that the defendants took advantage of the confidence reposed in the defendant Ryan by Mrs. McEldowney and thereby defrauded her of her property by a swindling scheme, and it is immaterial that the scheme took the form of a business transaction. (*Hughes v. People*, 223 Ill. 417; *Chilson v. People*, 224 id. 535; *People v. Depew*, 237 id. 574; *People v. Poindexter*, 243 id. 68.) The notes were not given with any intention or expectation of either party that they were to be paid, and the note for the \$12,500 draft was given, according to Ryan's testimony, so that Mrs. McEldowney could show it to her son.

It is also contended that a material element of the crime is the use of false or bogus checks, or other means, instrument or device, aside from false verbal representations, and that none was proved. The false and verbal representations, pretensions and statements in this case were supplemented by tricks and deception which led Mrs. McEldowney to believe that Ryan had supernatural powers, but no physical means of deception are necessary. The Supreme Court of Colorado has held that to constitute the offense of obtaining money by the confidence game the money or property must be obtained by some false or bogus means, instrument, symbol or device, as distinguished from mere words, however false or fraudulent; (*Wheeler v. People*, 49 Colo. 402;) but, as stated in the annotation of that case in Annotated Cases, 1912a, that doctrine has not been announced in any other reported case, and it is directly contrary to numerous decisions of this court, which are given above. The decision in *Wheeler v. People* is not the law in this jurisdiction.

The judgment is affirmed.

*Judgment affirmed.*

WALLACE C. ABBOTT, Defendant in Error, vs. CARL A.  
ANDERSON *et al.* Plaintiffs in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 3, 1914.*

1. PARTNERSHIP—in Illinois a partnership is not considered a legal entity distinct from members of the firm. The theory that a partnership is a legal entity distinct from and independent of the persons composing it is not recognized as the law in Illinois, and even the marshaling of assets, so as to apply the assets of the firm to the payment of firm debts and the individual assets to the payment of the individual debts of the several partners, is not recognized or enforced in a court of law but is a rule of equity founded on the equities of creditors.

2. SAME—rule where a bankruptcy proceeding is against a partnership. In an involuntary proceeding where the act of bankruptcy charged is one involving the insolvency of a partnership, there can be no adjudication against the partnership unless it and all its members are insolvent, and upon an adjudication of insolvency the assets of all the partners should be turned into the proceeding for administration.

3. BANKRUPTCY—creditors of firm have a right to have assets of partners brought in. Where a partnership is adjudged a bankrupt in an involuntary proceeding creditors have the right to have the assets of the partners, individually, brought into the administration, and any surplus above the payment of the individual debts of the partners will be assets of the firm for the payment of claims against it.

4. SAME—when individual partners of bankrupt firm are not liable to creditors accepting offer of composition. Where a partnership is adjudged bankrupt, and the creditors of the firm, instead of having the individual assets of the partners brought into the administration, accept an offer of composition under a mistaken view of the law that they could hold the individual partners liable for the balance on their claims, and without any promise by the partners to become so liable or any act upon their part amounting to an estoppel, the creditors cannot subsequently recover from the individual partners, in law or in equity, the balance remaining unpaid on their claims after the composition agreement has been carried out.

WRIT OF ERROR to the Branch "D" Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. CHARLES W. WALKER, Judge, presiding.

HUBERT E. PAGE, and NEWTON WYETH, for plaintiffs in error.

HERMAN FRANK, and HARRY J. LURIE, for defendant in error.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court :

Carl A. Anderson, and other persons and partnerships and a corporation, the plaintiffs in error, brought separate suits at law in the municipal court of Chicago against Wallace C. Abbott, the defendant in error, and nine other persons, who had been partners in a banking business at Ravenswood, in the city of Chicago, under the name and style of Ravenswood Exchange Bank, to recover alleged balances of claims against said bank above the dividends received in bankruptcy proceedings against the partnership. The defendant in error brought his suit in equity in the circuit court of Cook county to enjoin the prosecution of the suits of the plaintiffs in error and to restrain all other depositors of the bank from bringing and prosecuting suits against him and his partners. The bill alleged that all of the actions already brought, and numerous others threatened, depended upon the same questions of law and fact, and that the sole question of law was whether the discharge of the partnership in bankruptcy discharged the partners, individually, from the partnership debts. The power of the court of equity was invoked to avoid a multiplicity of suits and the delay and expense of litigation, by determining the question at issue in a single suit. The circuit court, upon a hearing, decided that the individual partners were discharged by the discharge in bankruptcy and entered a decree accordingly, and the Appellate Court for the First District affirmed the decree. The record is under review in this court in pursuance of a writ of *certiorari*.

The material facts are as follows: The complainant and nine others were partners under the name and style of Ravenswood Exchange Bank, doing a banking business, and on February 25, 1908, a number of the depositors filed in the district court of the United States for the northern district of Illinois, eastern division, their petition to have the complainant and his partners adjudged bankrupts. All of the partners appeared and were examined, and in the examination it appeared that some of the individual partners, including the complainant, had some pecuniary means and were not insolvent. On March 31, 1908, an order was entered declaring the partners, all of whom were named in the order, "co-partners trading as Ravenswood Exchange Bank," bankrupt. The partners filed a schedule of the property of the partnership but did not file any schedule of their individual property and they were not adjudicated bankrupt as individuals. They offered to the creditors of the partnership a composition of the claims by the payment of seventy-five cents on the dollar, which was accepted by a majority, in number and amount, of all the claims. The offer of composition contained this provision: "This composition, however, is made upon the following express terms and conditions: That in consideration of said offer of composition and the release of said creditors, and each of them, directly and indirectly, of and from liability for any costs taxable in the proceedings now pending, as aforesaid, in bankruptcy, and the proceedings pending, as aforesaid, in said circuit court of Cook county, and the payment to said creditors, and each of them, of the moneys due them under said composition when confirmed by said United States district court, said creditors, and each of them, do expressly accept said composition-payment in full satisfaction and discharge of any and all claims and demands of said creditors, and each and every one of them, in anywise or manner arising or accruing to them, and each of them, out of their respective claims against said Rav-

enswood Exchange Bank or against any of its past or present members, stockholders, shareholders, officers and directors." The defendant Carl A. Anderson and the other defendants, as creditors of the partnership, filed objections to the offer of composition, among which were the following:

*"Third—*The court has no jurisdiction of any of the past and present members, stockholders, shareholders, officers and directors of said bankrupt, and is therefore without power to confirm the acceptance of the offer as made.

*"Fourth—*The court has at this time no jurisdiction over the assets of the individual partners, as such, against which the creditors of the bankrupt concern have a legal right to pursue their remedy for any deficiency after a discharge in bankruptcy, either by composition or otherwise, and therefore the court is without power to compel a release of such assets from judgment and execution as conditioned in the offer of composition.

*"Fifth—*The court has no jurisdiction over the subject matter of the offer of composition as made, in this: That no one of the partners in his individual estate has been adjudicated a bankrupt, nor has any petition for such adjudication been filed in this or any other court. Such individual estates not, therefore, being bankrupt estates, this court, as a court in bankruptcy, has no jurisdiction over such solvent estates, and therefore no power to confirm the acceptance of the offer of composition."

The offer of composition, with the objections thereto, was referred to a referee and special master, who reported, as matter of law, that in his opinion adjudication of the firm as bankrupt did not draw after it an adjudication in bankruptcy of the partners; that a court of bankruptcy had no jurisdiction to summarily undertake and administer the individual estates of the solvent partners without their consent, and that creditors of a bankrupt partnership have a right to resort to suits to enforce against the individual

members the collection of deficiencies owing them after the partnership estate has been exhausted. From this view of the law he recommended that the offer of composition should be denied unless the bankrupt partnership elected, within a reasonable time, to strike out from its offer the proviso in question. The district court approved the report, and on motion of the bankrupt partnership gave leave to modify the offer by striking out the provision in question. The offer was modified accordingly, and the referee, after a hearing as to the facts, again made a report to the court, referring to his former report, the modification of the offer and the withdrawal of objections, and recommended that the acceptance by the creditors of the offer of composition be approved and confirmed. On June 10, 1908, the district court entered an order confirming the composition, and all of the creditors were paid the full amount of seventy-five cents on the dollar of their respective claims, pursuant to the terms of the composition.

The opinion of the referee as to the law, which was adopted by the district court, was derived from a decision of the circuit court of appeals in the case of *In re Birtenshaw*, 157 Fed. Rep. 363, (13 Ann. Cas. 986,) in which a trustee of three persons doing business as a firm, and who had been adjudged bankrupts, filed a petition, after the partnership property had been applied in partial payment of the claims, for an order upon one of the partners to turn over to him real estate owned by the partner individually. The referee found against the petition and the bankruptcy court confirmed the ruling. The circuit court of appeals held that a partnership is a distinct entity separate from the partners who compose it, and that it may be adjudged bankrupt although the partners who compose it are not so adjudicated; that where no partner is adjudged bankrupt the trustee has no power to enforce claims against any property except partnership property, and that partnership creditors may pursue partners who have not been adjudged

bankrupt by action at law and suits in equity, and the discharge of the partnership where the partners are not adjudicated bankrupt does not discharge the partners from their liability for partnership debts. It appears from the first report of the referee that the decision in the *Bertenshaw case* was understood by all parties to be the law. Afterward the Supreme Court of the United States, in the case of *Francis v. McNeal*, 228 U. S. 695, determined the law adversely to the view of the referee and district court and in terms disapproved the decision of the circuit court of appeals. The decision was that a firm is not an entity distinct from its members, and that the individual liability of the members is not collateral, like that of a surety, but primary and direct; that the assumption of the Bankruptcy act was that the partnership and individual estates both would be administered except in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, and that it would be an anomaly to allow proceedings in bankruptcy against joint debtors, from some of whom, before, pending or after the proceeding, the debt could be collected in full. The court alluded to the consent of Francis to hand over his property, according to the order of the court, without being put into bankruptcy individually, and his failure to object if his case came within section 54 of the Bankruptcy act, but the principles declared were directly contrary to those stated in the *Bertenshaw case*.

The theory that a partnership is a legal entity distinct from and independent of the persons composing it has never been recognized in the law of this State. Even the marshaling of assets so as to apply the assets of the firm to the payment of firm debts and the individual assets to the payment of individual debts of the several partners is not recognized or enforced in a court of law but is a rule of equity, founded on the equities of creditors. (*Meadowcroft v. People*, 163 Ill. 56.) It would be impossible that

a firm should be insolvent while the members, out of whose individual assets debts of the firm could be collected, are solvent. It necessarily follows that in an involuntary proceeding, where the act of bankruptcy charged is one involving insolvency of the partnership, there can be no adjudication against the partnership unless it and all its members are insolvent, and upon an adjudication of insolvency the assets of all the partners are turned into the proceeding for administration. As the partnership composed of the individuals doing business under the name and style of Ravenswood Exchange Bank was adjudged bankrupt, the defendants in this suit, who were creditors, had the right to have the assets of the partners individually brought into the administration, and then a surplus above the payment of individual debts would have been assets of the firm for payment of claims. The offer of composition was accepted without the proviso that the partners, individually, should be discharged from partnership debts and without any stipulation or agreement that they should remain liable for such debts, so that the question of liability rested on the law. The mere fact that the referee, the district court and the parties had a mistaken view as to what the law was, would not be sufficient to create a legal liability which did not otherwise exist.

The defendants withdrew their objections to the composition upon the proviso being stricken out, and when it had been stricken out there was nothing to which the objections could apply. The objections were not withdrawn upon the faith of any agreement that the partners should remain individually liable for any deficiency or upon any agreement that the law was as understood by the referee and the court, and the only effect of striking out the proviso was to leave the composition to have its legal effect without any agreement on the subject. We do not find any ground of estoppel against the complainant. The examination of the partners had shown that some of them



were solvent and their individual assets might have been drawn into the administration, but the creditors preferred to accept the offer of composition merely from a mistaken view of the law.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* William Koensgen *et al.* Defendants  
in Error, *vs.* V. L. STRAWN *et al.* Plaintiffs in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 4, 1914.*

1. *QUO WARRANTO*—*court must be asked in some way to carry demurrer back to information.* A demurrer to a plea in a *quo warranto* proceeding reaches back through the whole record and attaches to the first substantial defect in the pleadings, but such defect must be pointed out to the court if it exists and the court must be asked in some way to carry the demurrer back.

2. *SAME*—*right of signers of petition to consolidate school districts to withdraw signatures.* Persons signing a petition to consolidate school districts have a right to withdraw their signatures prior to any action being taken on the petition.

3. *SAME*—*effect when People reply to pleas by re-affirming the usurpation.* Where the pleas to an information in the nature of *quo warranto* show upon their face a legal organization the People may reply by re-affirming the usurpation, and this will impose upon the defendants the burden of proving the facts alleged in the pleas.

4. *SAME*—*matters alleged in pleas by way of inducement are not subject to traverse.* Replications which deny matters of inducement alleged in the pleas and tender an issue are bad, for the reason that facts alleged by way of inducement are not subject to traverse; and replications which deny matter of inducement and conclude with a verification are bad for both reasons.

5. *SAME*—*when it is error to overrule demurrer to replication.* Where a replication amounts to a mere averment that the matters and things alleged in the pleas are not true and applies only to matters of inducement the replication is bad, and it is error to overrule a demurrer thereto.

6. *SCHOOLS*—*petitions having necessary majority of legal voters are essential to the jurisdiction to create new district.* Petitions

signed by a majority of the legal voters of two school districts are essential to the jurisdiction of the board of trustees to consolidate the districts and create a new district, and if certain signers of the petitions withdraw their signatures before any action is taken on the petition and the withdrawal leaves the petitions without sufficient signers, the order of the board creating a new district is null and void.

7. SAME—*purpose of serving copy of petitions to consolidate school districts.* The purpose of serving copies of the petitions to consolidate school districts is to afford an opportunity for the districts concerned to appear and present reasons for or against the allowance of the petitions; and it is not sufficient to serve such copies on the clerks of the district boards if such clerks have signed the petitions for such consolidation.

8. APPEALS AND ERRORS—*when a judgment should not be reversed for error in rulings on pleadings.* Error in rulings upon the pleadings is not ground for reversal of a judgment of ouster in a *quo warranto* proceeding where all the evidence competent under any pleadings that could be filed was admitted.

WRIT OF ERROR to the Circuit Court of LaSalle county;  
the Hon. S. G. STOUGH, Judge, presiding.

W. C. JONES, for plaintiffs in error.

GEORGE S. WILEY, State's Attorney, (J. A. RIELY, and  
ARTHUR H. SHAY, of counsel,) for defendants in error.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion  
of the court:

The State's attorney of LaSalle county presented to the circuit court of that county his petition for leave to file an information in the nature of *quo warranto* against the plaintiffs in error, V. L. Strawn, R. M. Fritchett and C. P. Jones, calling upon them to show by what warrant they assumed to exercise the franchise of school district No. 4 in township 29, north, range 2, in said county. The petition alleged that prior to March 1, 1912, there existed in LaSalle county school districts numbered 4 and 5, both in township 29; that afterwards proceedings were had where-

by it was sought to consolidate said districts and organize a new district out of the territory belonging to them, under the name of district No. 4, in said township; that the petition by the legal voters in the original district No. 4, when acted upon by the board of trustees, was not signed by a majority of the legal voters of the district; that the copy of the petition was delivered by George H. Bane, one of the petitioners, to M. F. Bane, clerk of the board of directors of district No. 4, who was also one of the petitioners, and that the copy of the petition signed by the legal voters in district No. 5 was delivered by V. L. Strawn, one of the petitioners, to R. M. Pritchett, clerk of the board of directors of district No. 5, who was also one of the petitioners; that the proceedings were therefore illegal, null and void, and that defendants were elected school directors of the pretended new school district on May 14, 1912, and since that time had been, and still were, holding and executing, without any warrant or right, the offices of school directors of the pretended new school district. The court, deeming the petition sufficient, granted leave and the information was filed. The defendants filed two pleas, setting forth in detail, by way of inducement, alleged facts as to the manner in which the new school district was organized and concluding with a denial under the *absque hoc*. To these pleas the People filed general and special demurrers, which were overruled by the court, and nine replications were filed under leave given to reply double. The defendants filed a general and special demurrer to the replications, and the court sustained the demurrer to the first eight and overruled it as to the ninth, and the defendants elected to stand by their demurrer to the ninth replication. A trial of the issues was then had before the court, and during the trial the People, by leave of court, filed three additional replications, and by order of court the demurrer to the original replications stood to the first and second additional replications. The court overruled the demurrer

and the defendants elected to stand by it. The court found the issues for the People and entered judgment of ouster against the defendants and for costs, and from that judgment this appeal was taken.

The errors assigned and argued question the judgment on the following grounds, stated in their order: First, that by the information the new school district was made a defendant and its corporate existence thereby admitted; second, that the demurrer to the pleas should have been carried back and sustained to the information; third, that the trustees of schools had jurisdiction by the petitions signed by a majority of the legal voters and had the right to refuse to allow the withdrawal of names of petitioners; fourth, that the replications were demurrable, because they traversed allegations of inducement instead of the denial.

Where a corporation is made a defendant and appears and defends as such, its existence as a corporation is admitted and cannot afterward be denied. (*People v. City of Spring Valley*, 129 Ill. 169; *North and South Rolling Stock Co. v. People*, 147 id. 234; *People v. Central Union Telephone Co.* 192 id. 307.) But the school district was not made a defendant in this case and did not appear. The information charged that the defendants unlawfully held and executed, without any warrant or right whatsoever, the pretended offices of school directors of the pretended school district, and the information concluded with a prayer for process "against the said V. L. Strawn, R. M. Pritchett and C. P. Jones to make them answer to the said People by what warrant, right or authority they claim and exercise the franchise of district No. four (4), in township No. twenty-nine (29), north, range No. two (2), east of the third principal meridian, county of LaSalle and State of Illinois, and also by what warrant, right or authority they claim to hold and exercise and execute the offices of school directors of said pretended district No. four (4), in township No. twenty-nine (29), north, range No. two (2),

east of the third principal meridian, county of LaSalle and State of Illinois, aforesaid."

There are two obvious answers to the second proposition. The court overruled the demurrer of the People to the pleas and held the pleas good, so that there is no ground for complaint of the ruling. It is true that a demurrer reaches back through the whole record and attaches to the first substantial defect in the pleadings, but such a defect must be pointed out to the court if it exists and the court must be asked in some way to carry the demurrer back. (*Town of Scott v. Artman*, 237 Ill. 394; *Heimberger v. Elliot Frog and Switch Co.* 245 id. 448.) The record does not show any motion or request to have the demurrer carried back to the information, and there was no omission or defect in it if such a motion had been made, because in most general terms it merely charged usurpation of a franchise without setting forth the defects alleged in the petition.

As to the third proposition, the law is that the petitioners might withdraw their names from the petition prior to any action being taken on it. *Littell v. Vermilion County*, 198 Ill. 205; *Theurer v. People*, 211 id. 296; *Kinsloe v. Pogue*, 213 id. 302; *Mack v. Polecat Drainage District*, 216 id. 56; *Boston v. Kickapoo Drainage District*, 244 id. 577; *Malcomson v. Strong*, 245 id. 166; *Sny Island Drainage District v. Dewell*, 256 id. 126.

The answer made by counsel to the fourth proposition is, that the third additional replication was not demurred to and was not subject to demurrer and that it threw upon the respondents the burden of proof to prove the facts alleged in the pleas, and it is therefore immaterial whether the other replications were good or bad. That is not exactly correct. The pleas alleged facts which upon the face of the pleas showed a legal organization of the district. The People had the right to reply to the pleas by re-affirming the usurpation, which would impose upon the defend-

ants the duty of proving the facts alleged in the pleas. (*Wabash Western Railway Co. v. Friedman*, 146 Ill. 583; *People v. Central Union Telephone Co.* 232 id. 260.) This was done by the third additional replication. But the right of the People to a judgment depended upon other matter, consisting of the withdrawal of signatures and the identity of persons upon whom copies were served with the persons signing the petition, and those matters could be set up by replication. The court sustained demurrers to the original replications setting up these facts and overruled demurrers to additional replications by which they were alleged, but on the trial both parties were permitted to prove every fact alleged in the pleadings. The court sustained demurrers to the first eight replications, so that error cannot be assigned on that ruling, but error is properly assigned on overruling the demurrers to the ninth replication and the first and second additional replications, and a general review of the replications seems to be called for.

Of the original replications the first, third and fourth denied matter of inducement and tendered an issue, and were bad because facts alleged by way of inducement are not subject to traverse. The sixth and seventh denied matter of inducement and concluded with a verification, and were bad for both reasons. The ninth was a mere averment that the matters and things in the pleas alleged were not true. As it applied only to matter of inducement the replication was bad, and it was error to overrule the demurrer to it. The second replication alleged that Charles Whetzel, one of the signers of the petition in district No. 4, before any action was taken by the trustees, filed with the clerk of the board a paper directing his name to be canceled and stricken from the petition, and appeared in person at the meeting of the trustees and prior to any action being taken on the petition withdrew his name therefrom, leaving less than a majority of the legal voters as signers. The replication concluded with a verification, and was good,

as setting up new matter in reply to the pleas. The fifth replication alleged that R. M. Pritchett, clerk of the board of directors of school district No. 5, to whom the pleas alleged a copy of the petition was delivered, was the same R. M. Pritchett who signed the petition in that district, and that M. F. Bane, to whom the pleas alleged a copy of the petition was delivered as clerk of the board of directors of school district No. 4, was the same M. F. Bane who signed the petition in that district, and the replication concluded with a verification. The purpose of serving a copy of the petition is to afford an opportunity for the district concerned to appear and present reasons for or against the allowance of the petition, and the service of the copy is necessary to give the trustees jurisdiction. (*People v. Feicke*, 252 Ill. 414.) No objection was made or is now made to this replication on account of duplicity, and the demurrer was not good. The eighth replication alleged that Charles Whetzel and John G. Vissering, signers of the petition in district No. 4 set forth in the pleas, appeared in person in the meeting of the trustees, and prior to any action being taken on the petition withdrew their names therefrom, which was a good defense. The first additional replication again alleged the withdrawal by Charles Whetzel and John G. Vissering of their names from the petition in district No. 4, leaving less than a majority of the legal voters in the district, and it concluded with a verification; and the second additional replication averred that M. F. Bane on whom a copy was served was the same M. F. Bane who signed the petition in district No. 4, and that R. M. Pritchett on whom service was had was the same R. M. Pritchett who signed the petition in district No. 5. There was no objection to either of them on account of duplicity, and the court did not err in overruling the demurrers to them.

The only matters in controversy were those set out in the pleas and by the replications which were good. On

the trial the defendants were permitted to prove, and did prove, the signing of the petitions; the fact that as signed and filed they represented a majority of the legal voters in each district; that the copies of the petitions were served on the clerks of the boards of directors as alleged; that the trustees granted the prayers of the petitions and that upon appeal taken to the county superintendent of schools the order was confirmed, and that the defendants were regularly elected school directors of the alleged new district. The People, on the other hand, proved that there were nineteen legal voters of school district No. 4; that John G. Vissering signed the petition in that district in the evening of March 12, 1912, the last day on which it could be filed; that Charles Whetzel was called out of bed and signed it after ten o'clock, and it was filed by the clerk shortly before midnight of that day; that the meeting of the trustees was held on April 1, 1912; that on March 29, 1912, before that meeting was held, Whetzel filed with the clerk of the board his written withdrawal from the petition, leaving less than a majority of the legal voters as signers; that John G. Vissering and Whetzel appeared in person before the board and before the petition was acted upon withdrew their names. As the withdrawal of Charles Whetzel on March 29 by the writing then filed by him left the petition without a majority of the legal voters of the school district the trustees were without jurisdiction to proceed and the order creating the district was null and void. As all the evidence competent under any pleadings that could be filed was admitted, the judgment should not be reversed on account of any error in ruling upon the pleadings.

The judgment is affirmed.

*Judgment affirmed.*



PHIL MITCHELL, *et al.* Appellees, *vs.* THE CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY, Appellant.

*Opinion filed October 16, 1914—Rehearing denied Dec. 4, 1914.*

1. LIMITATIONS—*it is not essential that conveyances be sufficient to transfer legal title.* In an action of ejectment against a railroad company to recover a strip of land in a street, claimed by the plaintiffs as owners in fee of the abutting lots, conveyances sufficiently identifying the property are admissible in evidence in support of the defense of the twenty year Statute of Limitations as showing the defendant's claim of right to possession, and it is not essential that they be sufficient to transfer legal title.

2. SAME—*title by limitation may be transferred.* If at the time of an exchange of properties by railroad companies each company has acquired a title by virtue of the Statute of Limitations such title may be legally transferred.

3. SAME—*when successive possessions may be tacked to make one continuous possession.* While one who finds property vacant cannot, by merely taking possession, have the benefit of the possession of a previous tenant, yet the privity of estate necessary to make successive possessions a continuous possession may be effected either by conveyance or by parol agreement or understanding, and if each grantee succeeds to the possession of his grantor there is such privity between the occupants that their several possessions are referred to one entry and are regarded as continuous.

4. SAME—*when possession by a railroad is hostile to owner of fee in the street.* Possession by a railroad company of a strip of land in a public street is hostile to one who claims, as an abutting owner, to own the fee to the center of the street, notwithstanding the railroad company enters by permission of the city and pays the city for such use, as a right of action for trespass accrues to the abutting owner at the time of such entry, or he may enjoin the construction and operation of the railroad until the company has paid him compensation for the additional servitude.

5. EJECTMENT—*the owner of fee in street may bring ejectment though he has no right to immediate possession.* While a city may grant to a steam railroad company the right to lay its tracks along a public street, yet if the owner of the fee in the street does not grant such right, or it is not acquired by condemnation, he may bring his action for the compensation to which he is entitled and recover for all damages, past, present or future, or he or his grantee may bring ejectment at any time within the Statute of Limitations. (*Edwardsville Railroad Co. v. Sawyer*, 92 Ill. 377, explained.)

FARMER and VICKERS, JJ., dissenting.

APPEAL from the Circuit Court of Rock Island county; the Hon. R. W. OLMSTED, Judge, presiding.

WALKER, INGRAM & SWEENEY, and WILLIAM D. BARGE, (C. M. DAWES, and J. A. CONNELI, of counsel,) for appellant.

J. T. KENWORTHY, and S. R. KENWORTHY, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This suit in ejectment was begun in the circuit court of Rock Island county by Phil Mitchell, William C. Wadsworth and Mary H. Wadsworth, executors of the will of Philemon L. Mitchell, deceased, against the appellant, the Chicago, Burlington and Quincy Railway Company. The declaration alleged possession of lots 3 and 4 in block 1 in old (or original) town of Stephenson, now the city of Rock Island, and title in fee, and that the defendant entered into possession and unlawfully withheld the possession thereof. The plea was not guilty and the case was tried without a jury. During the trial it appeared that William C. Wadsworth died before the suit was begun, and the appellees, Phil Mitchell and Mary H. Wadsworth, were continued as plaintiffs. Lots 3 and 4 have a frontage of 160 feet on the south side of First avenue, in the city of Rock Island, formerly known as Mississippi, Water or Front street, and there was no evidence that the defendant had interfered with the possession of the lots or claimed any title thereto, but the suit was brought to recover a portion of First avenue of which plaintiffs claimed to own the fee subject to the public easement, on the ground that they had title to the center of the street. There was a street on the west side of lot 4, and the plaintiffs claimed title to the center of that street. The court found the issue for the plaintiffs and

entered judgment in their favor for a part of the avenue 200 feet long east and west, 106½ feet wide on the west end and 88½ feet at the east end, in front of lots 3 and 4 and extending to the center of the other street.

A history of the laying out and platting of the town of Stephenson is contained in the opinion in *Davenport and Rock Island Bridge Railway and Terminal Co. v. Johnson*, 188 Ill. 472. That was a suit to enjoin the building of a railroad embankment along the Mississippi river, with railroad tracks thereon in the street, by a corporation which had not obtained, by condemnation or otherwise, any right to appropriate the land for railroad purposes. It was there decided that when the town of Stephenson was laid out and platted the fee of the street remained in the county of Rock Island, and that the owners of lots fronting on the south side of the street owned the fee to the center of the street subject to the public easement, and decrees granting the relief prayed for were affirmed.

The plaintiffs introduced evidence to prove a connected chain of title from the United States to Philemon L. Mitchell, and also evidence of his last will and testament directing the plaintiffs, as executors, to sell and convey his real estate and to distribute the proceeds. Both parties offered evidence of the payment of taxes, the payments proved by the plaintiffs being of taxes on lots 3 and 4 and the payments proved by the defendant being of taxes on the railroad property in the street. Objections were made to the various items of evidence concerning title and payment of taxes, but, on each objection being made, the ruling was reserved and no ruling was afterward made, so that no ruling of court on the admission of evidence can be considered, and the only question before us is whether the competent evidence sustains the judgment. The evidence for the plaintiffs that the taxes had been paid on lots 3 and 4 was incompetent on the issue being tried, because the plaintiffs were not in actual possession of the premises in question

and they were not vacant and unoccupied during the period for which taxes were paid. The evidence of payment of taxes by the defendant was incompetent for want of any color of title to the fee, the paper title being to an easement, merely. No objection to the evidence of record title in the plaintiffs is pointed out in argument except as to a matter of description in one deed, which we do not regard as well founded, and our conclusion is that the plaintiffs proved ownership of the fee in the street adjacent to the lots to the center thereof, covering the portion of the street in controversy. It is not claimed that the plaintiffs could not maintain the suit by virtue of the will of Philemon L. Mitchell owned the fee at the time of his death, in 1895.

The defense made at the trial was, that the action was barred by the Statute of Limitations of twenty years, under the following state of facts: In 1856 the city council of the city of Rock Island passed an ordinance granting to the Rock Island and Peoria Railroad Company permission to construct, maintain and use one railroad track through and along Water street over the premises in question, and in 1857 that corporation entered upon the premises and built its railroad, which has been in operation since that time. That corporation was called, at different times, Rock Island and Peoria Railroad Company and Rock Island and Peoria Railway Company, the words "railroad" and "railway" being used to designate the same corporation. The premises granted by the ordinance were occupied and used for railroad track and railroad purposes by that corporation until 1877, when the entire railroad, branches, tracks, right of way, depot grounds and other lands and property were sold under a decree of the circuit court of the United States for the northern district of Illinois on the foreclosure of mortgages made by the corporation. The sale was approved, and on December 12, 1877, the master in chancery of said court conveyed the property sold to the Rock Island and Peoria Railway Company,—a corporation then recently

organized. The grantee entered into possession and operated the railroad. On each transfer possession was taken by the purchaser, and the railroad was continuously operated over the premises from the time of the first entry, in 1857, up to the commencement of this suit, on December 21, 1910. The Rock Island and Peoria Railway Company occupied and used the premises and track from the date of the deed to it up to the year 1898, when the defendant acquired the track and premises by an exchange of tracks, as hereinafter stated, and entered into the possession and use thereof. On May 26, 1869, the city council of the city of Rock Island passed an ordinance granting to the Rockford, Rock Island and St. Louis Railroad Company the right to construct, maintain and use double tracks in the street, and also granted the said company grounds for depot and other railway purposes not included in the premises in controversy, for which the railroad company was to pay \$200 annually to the city. In 1870 the Rockford, Rock Island and St. Louis Railroad Company entered upon the street and constructed its double tracks, which have been possessed and used ever since that time for railroad purposes. That corporation operated the railroad, and on July 13, 1875, the circuit court of the United States for the northern district of Illinois entered a decree of foreclosure against that corporation with an order of sale of its property by the master in chancery of the court to satisfy the same. The master in chancery made the sale to Heyman Osterburg, trustee for the bondholders, and conveyed the same to him on May 18, 1876. On the same day Osterburg conveyed the railroad and property to the St. Louis, Rock Island and Chicago Railway Company, which leased the railroad to the Chicago, Burlington and Quincy Railroad Company. In 1898 the St. Louis, Rock Island and Chicago Railway Company, and its lessee, the Chicago, Burlington and Quincy Railroad Company, and the Rock Island and Peoria Railway Company, desired to make a trade or transfer of tracks

for their mutual interest and convenience, and agreed that the Rock Island and Peoria Railway Company should transfer to the St. Louis, Rock Island and Chicago Railway Company, and its lessee, the Chicago, Burlington and Quincy Railroad Company, the main track in the street opposite lots 3 and 4, in consideration of which the defendant and its lessor were to turn over and transfer to the other corporation their two local tracks in front of these lots. The city council passed an ordinance for the transfer under a frontage consent signed by one of the executors for the estate and by other property owners, and the main track, for which the right was granted in 1856, was transferred to the Chicago, Burlington and Quincy Railroad Company and its lessor, and the two tracks authorized by the ordinance of 1869 were transferred to the Rock Island and Peoria Railway Company, and possession was taken by the respective parties. On June 1, 1899, the St. Louis, Rock Island and Chicago Railway Company conveyed its railroad, by deed, to the Chicago, Burlington and Quincy Railroad Company, and the latter corporation, on November 20, 1901, executed a lease of the railroad and property for ninety-nine years to the Chicago, Burlington and Quincy Railway Company, the defendant in the suit. On June 11, 1903, the Rock Island and Peoria Railway Company sold and conveyed its railroad and property to the Chicago, Rock Island and Pacific Railway Company.

Objections were made to the various deeds and documents offered by the defendant to prove the several transfers, and there was no ruling by the court on any of them, the ruling each time being reserved and not afterward made. The evidence was competent and the objections without force. The description in each deed and document was sufficient to identify the property, and, regardless of all other questions, they were competent to prove a defense under the Statute of Limitations. It is not essential to such a defense that a conveyance under which

possession is taken shall be sufficient to transfer a legal title. All that is necessary is to show that the possession is under a claim of right. The claim need not be a well-founded one, and a grant, sale or gift of land by parol, accompanied by actual entry and possession, manifests the intention of the donee to enter and take as owner and his possession is adverse. (*Schmidt v. Brown*, 226 Ill. 590.) The Rock Island and Peoria Railroad Company in 1857 entered upon the street and into the open, visible and adverse possession thereof as against all the world except the city of Rock Island, representing the public right and easement. In 1870 the Rockford, Rock Island and St. Louis Railroad Company entered upon the street and into the open, visible and adverse possession thereof except as against the public right, and constructed its double tracks thereon. The several corporations, by virtue of the grants to them, entered successively into the possession of the property, and have during the respective periods since the first entry been in the actual, open and visible occupation of the premises. The several deeds were sufficient to distinguish the railroad and tracks from all others, and parol evidence was admissible to identify and connect, with the transfers, the railroad property conveyed. *Lake Shore and Michigan Southern Railway Co. v. Pittsburg, Ft. Wayne and Chicago Railway Co.* 71 Ill. 38; *Waggoner v. Wabash Railroad Co.* 185 id. 154.

The principal argument against the defense is, that in 1898, by the exchange and transfer of tracks, all rights of the respective parties were lost and that the limitation period must commence from such transfer of right and possession. At the time of the transfer the Statute of Limitations had run in favor of each of the railroad corporations, so that each had acquired title by limitation which might be legally transferred to another, but if it had been necessary under the statute, the successive possessions might be tacked so as to make one continuous possession. There must be privity of estate to make the possession continuous, and one

finding property vacant cannot, by taking possession, have the benefit of a possession of a previous claimant, but the privity necessary to constitute successive possessions a continuous possession may be effected either by conveyance or parol agreement or understanding. If each grantee succeeds to the possession of his grantor there is such privity between the occupants that their several possessions are referred to one entry and are regarded as continuous. *Weber v. Anderson*, 73 Ill. 439; *Faloon v. Simshauser*, 130 id. 649; *Ely v. Brown*, 183 id. 575; *Kepley v. Scully*, 185 id. 52.

It is further contended that the possession was never adverse to the owners of the fee because the railroad companies entered by permission of the city and in recognition of the public easement. The possession must be actual, visible and notorious, and the possession of the railroad companies answered this condition. It was hostile and adverse to anyone claiming the fee in the street and to all titles or claims other than the title granted by the city of Rock Island. The owner of the fee could have brought his action of trespass against each company at the time of its entry, or could have had the aid of a court of equity to prevent the occupation of the street until his title should be acquired. The possession which would authorize an action of trespass by the owner of the fee was necessarily adverse to him, and it is entirely immaterial to his right whether any payment was to be made to the city or whether it was to be paid annually. The laying of a track for a steam railroad in a public street the fee of which is in an abutting owner is an additional servitude for which the owner of the fee is entitled to compensation, and such owner may maintain trespass or enjoin the railroad company from constructing or operating its road without first settling with him, even though the municipal authorities have granted permission to construct and operate the road on the street. (*Bond v. Pennsylvania Co.* 171 Ill. 508; *Pennsylvania Co.*



v. *Bond*, 202 id. 95; *Rock Island and Peoria Railway Co. v. Johnson*, 204 id. 488; *Wilder v. Aurora Traction Co.* 216 id. 493; *Spalding v. Macomb and Western Illinois Railway Co.* 225 id. 585; *Davenport Bridge Railway and Terminal Co. v. Johnson*, *supra.*) A right of action, therefore, accrued to the owner of lots 3 and 4 at the date of each original entry, and if the plaintiffs can maintain ejectment now the owner could have maintained it then.

It is urged against the judgment that the plaintiffs could not maintain ejectment for the premises located in the street because they had no immediate right of possession, but this court has held the contrary. In the case of *Postal Telegraph-Cable Co. v. Eaton*, 170 Ill. 513, the corporation had constructed its telegraph line along the public highway without obtaining a right of way by consent of the owner of the fee or by condemnation proceedings, and it was decided that the owner of the fee could maintain ejectment to exclude the corporation from the highway until the right of way was obtained. That decision was on the ground that the telegraph line was an additional burden upon the fee, and the same rule must apply to a steam railroad on the same ground. The public use is for only customary modes of travel, and while the city may grant the right to a railroad company to lay its track along or across a street by virtue of the statute, if the owner of the fee does not grant the right or it is not acquired by condemnation, the railroad company has no right, as against him, to occupy the street. He may bring his action for the compensation to which he is entitled and recover for all damages, past, present or future. (*Indianapolis, Bloomington and Western Railroad Co. v. Hartley*, 67 Ill. 439; *Chicago and Alton Railroad Co. v. Maher*, 91 id. 312; *Chicago and Eastern Illinois Railroad Co. v. Loeb*, 118 id. 203; *Penn Mutual Life Ins. Co. v. Heiss*, 141 id. 35; *Galt v. Chicago and Northwestern Railway Co.* 157 id. 125.) The owner of the fee, or his grantee, may bring a suit in ejectment at

any time within the Statute of Limitations. In the case of *Edwardsville Railroad Co. v. Sawyer*, 92 Ill. 377, where a railroad track was laid in a public highway, it appears that the controversy at the trial was whether there was a public highway. The plaintiff testified that the county road upon which the railroad track was located was laid out without his consent, that he never received any pay for the land taken by the road, and at divers times made objections to the laying out of the road. He had recognized the road, and the court said it must be taken to be a legally located road, and it would be presumed that the defendant was using the road by consent of the public authorities. What was decided was, that the privilege of laying a track in a public road was a matter between the road authorities and the railroad company, and their action could not be questioned by private individuals. That case has been cited in *Mapes v. Vandalia Railroad Co.* 238 Ill. 142, as sustaining the proposition that our decisions are adverse to a claim that ejectment will not lie against a railroad company for a portion of its right of way, and it was cited, together with *Postal Telegraph-Cable Co. v. Eaton*, *supra*, in *Chicago, Peoria and St. Louis Railway Co. v. Vaughn*, 206 Ill. 234, to the proposition that ejectment will lie by an owner against a railway corporation which has taken his land and used it but has not condemned it in proceedings instituted for that purpose. Our decisions are in harmony with the general rule stated in Elliott on Roads and Streets, (sec. 814,) that an abutter may maintain ejectment where a railroad is constructed without authority upon a highway of which he owns the fee.

The finding of the court was contrary to the evidence and the judgment is not supported by it. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

FARMER and VICKERS, JJ., dissenting.

HENRY J. PATRY, Appellant, *vs.* THE CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, Appellee.

*Opinion filed October 16, 1914—Rehearing denied Dec. 4, 1914.*

1. RAILROADS—*when Federal Employers' Liability act does not apply.* Under the decision of the Supreme Court of the United States in *Illinois Central Railroad Co. v. Behrens*, 233 U. S. 473, the provisions of the Federal Employers' Liability act are limited to injuries occurring while the particular service in which the employee was engaged was a part of inter-State commerce.

2. PRACTICE—*when request for a peremptory instruction presents a question of law.* A request for a peremptory instruction to direct a verdict for the defendant railroad company as to counts of the declaration relying upon the Federal Employers' Liability act presents a question of law, where there are no disputed facts in the evidence on that question and no room for two conclusions from the evidence, under the law as laid down by the Supreme Court of the United States.

3. SAME—*when right to assign error on refusal of peremptory instruction is not waived.* The right of a defendant to assign error on the ruling of the trial court refusing a peremptory instruction is not waived by the defendant subsequently requesting an instruction based upon the view of the law taken by the court.

4. SAME—*limit on authority of the Appellate Court to make a finding of facts.* The authority of the Appellate Court to make a finding of facts is limited to cases where it finds the facts wholly or in part different from the finding of the trial court.

5. SAME—*when Appellate Court has no authority to find that the plaintiff was guilty of contributory negligence.* Where there are counts charging a violation of the Federal Employers' Liability act and a count charging common law negligence, but in addition to the general verdict of guilty there is a special finding that the plaintiff and the defendant at the time of the accident were engaged in inter-State commerce, such finding precludes any liability under the common law count, but the Appellate Court, on reversing the judgment because it finds that the parties were not engaged in inter-State commerce, cannot make a finding that the plaintiff was guilty of contributory negligence and make such finding the basis of a final judgment in that court.

6. SAME—*what is not a finding by the jury that plaintiff was negligent.* Where the court assumes in a special interrogatory that the plaintiff was guilty of contributory negligence and asks

the jury how much should be deducted on that account from the damages sustained, which interrogatory is answered, "\$5000," the answer so made cannot be regarded as a finding by the jury that the plaintiff was guilty of contributory negligence.

APPEAL from the Branch "B" Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. MAZZINI SLUSSER, Judge, presiding.

JAMES C. McSHANE, for appellant.

C. G. AUSTIN, and BEVERLY W. HOWE, (W. S. KIES, of counsel,) for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

The appellant, Henry J. Patry, a switchman in the employ of the Chicago and Western Indiana Railroad Company, sued that company for injuries sustained by a collision of cars in the Dearborn station, in Chicago, and recovered a judgment for \$12,000, which Branch "B" of the Appellate Court for the First District reversed, with a finding of facts rendering final judgment against the appellant. A certificate of importance and an appeal to this court were allowed.

The case was submitted to the jury upon four original counts, each charging that both the plaintiff and the defendant were engaged in inter-State commerce at the time of the accident and claiming a liability under the Federal Employers' Liability act, and two additional counts claiming a liability at common law. It is not necessary to state the facts at length. They may be found in the opinion of the Appellate Court. (185 Ill. App. 361.) Since the filing of that opinion the Supreme Court of the United States has decided, in the case of *Illinois Central Railroad Co. v. Behrens*, 233 U. S. 473, that the provisions of the Federal Employers' Liability act are limited to injuries occurring

while the particular service in which the employee was engaged was a part of inter-State commerce. It is conceded that the particular service in which the plaintiff was engaged at the time of his injury was not inter-State commerce within this decision, and therefore no liability existed under that act. It is, however, contended by the appellant that the question whether or not the appellant and the appellee were engaged in inter-State commerce was not subject to review in the Appellate Court either as a question of fact or a question of law,—not as a question of fact, because the jury, in answer to special interrogatories, found that the appellant and the appellee were engaged in inter-State commerce at the time of the accident, and the appellee did not move to set aside these findings in its motion for a new trial or otherwise, and therefore is bound by them; not as a question of law, because the legal question whether there was any evidence tending to show that the appellant and the appellee were engaged in inter-State commerce was not saved by the refusal of a peremptory instruction as to each count, for the reason that such peremptory instructions were not asked before but either with or after the general instructions submitting the question as one of fact, and for the further reason that there was one common law count which the evidence tended to prove. Disregarding the question as one of fact, there were no disputed facts in the evidence as to this question and no room for two conclusions from those facts under the law as declared in *Illinois Central Railroad Co. v. Behrens*, *supra*. The request for the instruction, therefore, raised the question as one of law, unless for some reason outside the instruction itself the court was justified in refusing it.

It appears from the bill of exceptions that after the introduction of all the evidence the jury were excused, the court and counsel retired to the judge's chambers, the court requested counsel to let him have their motions, and some statements were made in regard to motions made at the

close of plaintiff's case. Then the court instructed counsel on each side to exchange instructions for the purpose of examination during the noon hour and to return them to the court with such advice and criticism as they desired to make, and thereupon copies of the appellant's instructions were given to the appellee and copies of the appellee's instructions to the appellant for perusal during the noon hour. When the court met at two o'clock these instructions were returned to the respective counsel. Thereupon the appellee, by its counsel, moved for an instruction to find the defendant not guilty, severally, as to each count of the declaration, accompanying each motion with a written instruction. These motions were all denied and the rulings were excepted to. A number of special interrogatories were then asked and allowed. Some of the argument of counsel is then set out in the bill of exceptions, which then proceeds: "And thereupon, before argument of counsel to the jury and before tendering any other instruction to the court, which were afterward tendered to the court and refused and given, as hereinafter set forth, plaintiff tendered to the court and requested the court to give to the jury" certain instructions. The court refused two and modified and gave one. "And thereupon, at the same place and time but after the argument of counsel to the jury," the court gave to the jury, at the request of the plaintiff, certain instructions and at the request of the defendant certain instructions.

From this record it is apparent that when the evidence closed, counsel on either side had their instructions prepared for submission to the court and at the court's suggestion exchanged them for mutual examination during the noon hour but they were not then submitted to the court for his consideration. When court met, each party received his own instructions from the other but they were not then submitted to the court. Counsel for the appellant presented first his written instruction for a verdict as to each count, and counsel for appellee then presented his preliminary in-

structions. Afterward the court, at the request of the respective parties, gave their instructions in the case generally. The question as to whether there was any legal evidence to sustain the claim that the parties were engaged in inter-State commerce was thus preserved as a question of law.

It is argued for the appellant that prior to the decision of *Illinois Central Railroad Co. v. Behrens*, *supra*, the test in deciding whether a particular act or service of a railroad was within the Employers' Liability act was whether such act had a real and substantial relation to or connection with such commerce and not whether the particular act or service itself was actually a part of inter-State commerce; that the parties both adopted this test and theory on the trial; and that the appellee having tried the case on this theory can not now abandon it. The appellee asked, and the court gave, an instruction based on this theory, and this is now cited as showing its adoption of such theory. The asking of this instruction did not, however, under the circumstances, commit the appellee irrevocably to that view of the law. Its counsel had asked the court, in accordance with their view of the law, to instruct the jury to return a verdict for it because the evidence showed that it and the appellant were not engaged in inter-State commerce. Having preserved an exception to the refusal of this instruction, the appellee had a right to request an instruction based on the view of the law taken by the court without waiving thereby the ruling on the instruction or the right to assign error on its refusal. *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67.

It is argued on behalf of the appellant that if the judgment could not be sustained under the Employers' Liability act the Appellate Court should have remanded the cause for a new trial on the common law counts. Since the court properly held there was no liability under the Employers' Liability act as a matter of law, the judgment would properly be reversed, so far as that issue was concerned, with-

out remandment. The Appellate Court has no authority to make a finding of facts unless it finds the facts in whole or in part different from the finding of the trial court. (*Treat v. Merchants' Life Ass'n*, 198 Ill. 431.) The verdict apparently was based upon the Employers' Liability act, for the jury found, in answer to special interrogatories, that both the appellant and the appellee were at the time of the accident engaged in inter-State commerce. This finding precluded any liability under the common law counts, and the other findings of fact in answer to the special interrogatories are not such that the judgment of the jury as to whether the appellant was guilty of contributory negligence or not can be ascertained. There was a general verdict of guilty. If this referred to the common law counts, alone, it implied a finding that the appellant was not guilty of contributory negligence, but if it referred to the inter-State commerce counts it did not. There is a finding that it was the appellant's duty to look out for signals to transmit them to the engineer, but no finding that he was guilty of negligence which contributed to his injury. The following interrogatories were answered as indicated:

"What sum is the whole amount of damages sustained by the plaintiff by reason of the injuries sustained by him?—\$20,000."

"What sum, if any, should be deducted from the damages sustained by the plaintiff as the proportion or just share thereof attributable to the negligence of the plaintiff?—\$5000."

This is supposed by counsel for the appellee to indicate a finding of contributory negligence by the jury, but no such inference can be drawn from it. The second interrogatory does not submit the question of contributory negligence. It assumes it, and, assuming it, asks how much should be deducted on account of it. The jury did not say that the plaintiff was guilty of negligence for which any sum should be deducted, though they did deduct \$5000,



the verdict being for \$15,000. This interrogatory should not have been submitted to the jury. The jury were not asked to, and did not, express any judgment as to the fact of contributory negligence. The court having assumed, in submitting the interrogatory, that there was contributory negligence, the jury apparently acted on that assumption without any finding in regard to it. Since it cannot be ascertained from the record that there was any finding by the jury on the question of contributory negligence, the Appellate Court had no power to make the finding which it did make, that the appellant was guilty of contributory negligence, and make such finding the basis of a final judgment in the Appellate Court, since a finding on that question, as the case was considered by the jury, was not essential to the judgment of the trial court.

The judgments of the Appellate Court and of the circuit court will be reversed and the cause remanded to the circuit court for a new trial.

*Reversed and remanded.*

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THE PEOPLE *ex rel.* W. O. Wilcox *et al.* Appellants, *vs.*  
WILLIAM BARBER *et al.* Appellees.

*Opinion filed October 16, 1914—Rehearing denied Dec. 3, 1914.*

1. QUO WARRANTO—*office of information in nature of quo warranto.* The office of an information in the nature of *quo warranto* is not to tender an issue of fact, but merely to call upon the defendants, in general terms, to show by what warrant they are exercising the privilege claimed, and it is sufficient to allege, generally, that they are exercising the same without lawful authority.

2. SAME—the People are not required to set out any specific facts. In an information in the nature of *quo warranto* the People are not required to set out any specific facts upon which to base the charge that the defendants are exercising a certain privilege without lawful authority, but the defendants must in their plea either disclaim or justify, and if they justify they must set out such facts as will refute the charge.

3. SAME—*what is sufficient ground for information in quo warranto.* An information in the nature of *quo warranto* to test the legality of the annexation of lands under section 42 of the Farm Drainage act may rest solely upon the ground that the annexed lands had not been connected with the ditches of the district, and it is not necessary for the People to either allege or prove fraud by the defendants.

4. SAME—*pleading to an information waives alleged error in overruling a demurrer.* By pleading to an information in the nature of *quo warranto* the defendants waive their right to assign as error the overruling of a demurrer to the information based upon the alleged ground that the information was double, in that it charged the defendants with separate and distinct usurpations as to each tract of land claimed to have been annexed to defendants' drainage district without authority of law.

5. SAME—*what must be shown to justify annexing lands to a drainage district.* Where the defendant drainage commissioners attempt to justify their action in annexing the lands of the relators to the district, under section 42 of the Farm Drainage act, on the ground that the relators had connected their lands with the ditches of the district, it is incumbent upon the defendants to prove such connection as to each tract in controversy.

6. DRAINAGE—*what must be proven to show connection with ditches of district.* In order to establish that a tract of land lying outside a farm drainage district has been connected by the owner with the ditches of the district, it is not sufficient to show, merely, that the waters from such land ultimately pass into and through the district ditches, but it must further be shown that an artificial ditch has been constructed leading from the land directly into the district ditch or into some ditch which has theretofore been artificially connected with the drainage ditch.

7. SAME—*what does not amount to connection with ditches of the district.* Where the lands in a drainage district as originally formed have always been servient, as to drainage, to lands not included in the district, the fact that the owners of the latter lands collect the surface waters upon their respective tracts and by means of tile drains or open ditches conduct them, in the natural course of drainage, into natural water-courses which directly or indirectly empty into the ditches of the district, does not amount to a connection of the lands with the ditches of the district, as meant by section 42 of the Farm Drainage act.

APPEAL from the Circuit Court of Christian county;  
the Hon. J. C. McBRIDE, Judge, presiding.

HARRY B. HERSHEY, State's Attorney, BROWN & BURNSIDE, and JOHN E. HOGAN, for appellants.

TAYLOR & TAYLOR, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

This was a proceeding in the nature of *quo warranto*, brought in the circuit court of Christian county against the commissioners of Union Drainage District No. 1 of the towns of Pana and Assumption, in Christian county, to test the legality of the annexation by the commissioners of certain lands to said district. The information was filed by the State's attorney of Christian county upon the relation of W. O. Wilcox and M. Hutchins, two of the owners of land attempted to be annexed to the district, and attacked the legality of the annexation of the relators' lands and the lands of more than fifty other persons whose names and a description of the lands owned by each were set forth in the information. Thereafter, by leave of court, an amended information was filed upon the relation of all the owners of land mentioned in the original information. In other respects the amended information is substantially the same as the original information and questions the legality of the annexation of the same lands. The defendants demurred to the amended information, one of the special grounds of demurrer being that it is double, in that it charges the defendants with sixty-two separate and distinct usurpations. The demurrer was overruled, and the defendants filed pleas justifying their action in annexing said lands to the district on the ground that the relators had connected their lands with the ditches of the district, and had thereby, by virtue of the statute, applied to be included in the district, and that the defendants had thereafter, as required by statute, annexed said lands to the district and classified the same for the purpose of making assessments

thereon. A replication denying that the relators had connected their lands with the ditches of the district was filed, and the cause proceeded to trial before a jury upon the issue thus made. After hearing the evidence and viewing the premises in controversy the jury returned a verdict finding the defendants not guilty. A motion for a new trial was made and overruled and judgment was rendered in favor of the defendants. This appeal has been prosecuted from that judgment.

Before proceeding to consider the grounds relied upon by appellants for reversal it is necessary to dispose of the cross-errors assigned by appellees.

It is first urged by appellees that the amended information is fatally defective because it does not charge that the commissioners acted fraudulently in annexing the lands of the relators to the drainage district. This contention is necessarily the result of a misconception of the office of an information in the nature of *quo warranto*. If it be conceded that the action taken by the commissioners in annexing the relators' lands to the district could only be attacked on the ground that the commissioners acted fraudulently, still it would not be necessary to allege fraud in the information. The office of an information in the nature of *quo warranto* is not to tender an issue of fact, but merely to call upon the defendants, in general terms, to show by what warrant they are exercising the privilege claimed, and it is sufficient to allege, generally, that they are exercising the same without lawful authority. The People are not required to set out in the information any specific facts upon which to base the charge that the defendants are exercising a certain privilege without lawful authority, but the defendants must, in their plea, either disclaim or justify, and if they justify they must set out such facts as will refute the charge that they are exercising the privilege complained of without lawful authority. (*People v. Central*

*Union Telephone Co.* 232 Ill. 260.) We are of the opinion, however, that the legality of the annexation of the lands of relators to the district can be attacked in this proceeding solely on the ground that such lands have not been connected with the ditches of the district and that it is not necessary for the People to either allege or prove fraud. The pleas filed by the defendants, as well as the proof, show that the annexation of the lands of relators was made under and by virtue of section 42 of the Farm Drainage act, which provides that "the owners of land outside the drainage districts \* \* \* may connect with the ditches of the district already made, by the payment of such amount as they would have been assessed if originally included in the district," and "if individual land owners outside the district shall so connect, they shall be deemed to have voluntarily applied to be included in the district, and their lands benefited by such drainage, shall be treated, classified and taxed like other lands within the district." In *People v. Drainage Comrs.* 143 Ill. 417, it was said: "No appeal is allowed by the statute from the classification of the lands of the relators or from the determination of the commissioners to classify them, and the right to classify and assess them being dependent, not upon any order of the commissioners, but upon the fact of connection with the ditches of the district, that fact was properly before the court upon *quo warranto*. That fact is jurisdictional, and without it exists the proceedings of the commissioners in respect of classifying or assessing the land are without authority of law." In *Shanley v. People*, 225 Ill. 579, following previous decisions of this court, we held that the determination by commissioners that lands lying outside a drainage district had been connected with the ditches of the district "can only be reviewed in a direct proceeding by *quo warranto*," clearly recognizing the right of land owners whose lands have, under section 42, *supra*, been annexed to the district by the commissioners, to have the question

whether their lands have been connected with the ditches of the district determined as one of fact in a proceeding in the nature of *quo warranto*, irrespective of the question whether the commissioners acted fraudulently in assuming jurisdiction over such lands. The statute makes no provision for a review of the decision of the commissioners upon this question of fact, and it is too well established to require discussion that the land owners are entitled to their day in court.

It is next urged that the court erred in overruling the demurrer to the amended information because the amended information is double, in that it charges the defendants with sixty-two separate and distinct usurpations, this contention being based on the fact that the amended information attacks the legality of the annexation of sixty-two tracts of land upon the relation of more than fifty land owners who own their lands in severalty. This suit was prosecuted in the name of the People upon the relation of the several relators, and in *People v. O'Connor*, 239 Ill. 272, referring to the practice in such cases, it was said: "The uniform practice has been in this State, where land owners seek to question the rights of drainage commissioners to incorporate their lands in a drainage district, to permit several land owners to join as relators in the same information." Moreover, appellees are not now in a position to question this action of the court, because by pleading to the information they waived their demurrer and cannot now assign error upon the action of the court in overruling the demurrer. *Beer v. Philips*, Breese, 44; *Nordhaus v. Vandalia Railroad Co.* 242 Ill. 166.

The cross-errors are not well assigned.

The principal ground relied upon by appellants for reversal is, that the court erred in refusing a peremptory instruction, offered at the close of all the evidence, directing the jury to return a verdict of guilty against the defendants as to each tract of land belonging to the relators.

This instruction should have been given. The commissioners having attempted to justify their action in annexing the lands of the relators to the drainage district and in exercising the authority of drainage commissioners over those lands on the ground that the relators had connected their lands with the ditches of the district, it was incumbent upon them to prove such connection as to each tract of land in controversy. (*People v. City of Peoria*, 166 Ill. 517; *People v. Bug River Drainage District*, 189 id. 55.) This they not only failed to do, but, on the contrary, the evidence offered by them shows that no such connection had been made as would warrant them in assuming jurisdiction over the lands of any of the relators. The theory upon which the commissioners proceeded in annexing these lands to the district seems to have been that section 42 of the Farm Drainage act authorized them to annex to the district all lands whose waters ultimately found their way into the ditches of the district. This is apparent from the testimony of the commissioners. J. A. Rayhill, one of the commissioners, testified: "We went over all these lands when we were seeking to annex them to the district, and found them all higher than the drainage district lands. \* \* \* We took the water and the levels of the land, and wherever the water sloped so as to drain towards the district and the water finally ran into the district we included that tract, and that is true as to any tract in the information. The way we found it, we found where the watershed was, where the water ran off into some other outlet and where the water ran into the district, and if it drained towards and finally emptied into it we attached them." W. D. Fribley, another of the commissioners, testified: "We were aiming to take in this watershed and waters that run into this ditch with the ditches that drained the land. We were undertaking to take in all the lands, with their ditches and drains, that drained into this ditch; and that was what we did, and that was particularly the

basis that determined in taking it in. We considered that whatever waters finally ran into the ditch would be beneficial to the land. That reason, coupled with the reason that we were put to a great expense to take care of their water, was the reason." Upon no other theory could the commissioners have annexed the lands of the relators to the drainage district. There is no proof whatever showing that any individual relator has directly connected a ditch carrying water from his or her land with a ditch of the district, nor that he or she has connected a ditch carrying water from his or her land with any ditch theretofore artificially connected with the district ditch. The evidence shows that the lands included in the drainage district as originally formed, so far as drainage is concerned, are, and always have been, servient to the lands of the relators, and that the relators have done nothing further than to collect the surface waters upon their respective tracts of land and by means of tile drains and open ditches conduct them, in the natural course of drainage, into natural water-courses which either directly or indirectly have as their outlet the ditches of the district. Such acts on the part of land owners outside a drainage district do not constitute connecting with the ditches of the district within the meaning of the statute. In order to establish that a tract of land lying outside a drainage district has been connected by the owner with the ditches of the district it is not sufficient to merely show that the waters from that tract ultimately pass into and through the district ditches, but it must further appear that an artificial ditch has been constructed leading from that land directly into the district ditch or into some ditch which has been theretofore artificially connected with the drainage ditch. Such is, in effect, the substance of our previous decisions upon this question. (*People v. Drainage District*, 155 Ill. 45; *People v. Wild Cat Drainage District*, 181 id. 177; *Gar Creek Drainage District v. Wagner*, 256 id. 338.) The proof fails to show that any of the



relators' lands have been so connected, and the authority of the drainage commissioners to annex the lands in controversy to the district was therefore not established.

The judgment of the circuit court is reversed and the cause remanded.

*Reversed and remanded.*

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ANN E. PYATT, Appellant, vs. MINNIE D. RILEY, Appellee.

*Opinion filed October 16, 1914—Rehearing denied Dec. 3, 1914.*

1. PRACTICE—*pleadings may be amended when the cause is remanded generally.* Where a judgment is reversed and the cause is remanded, generally, for a new trial, the defendant may amend her pleadings and present any additional defense she may have to the plaintiff's claim.

2. TRUSTS—*what does not tend to show that grantee in sheriff's deed holds the title in trust.* The mere facts that the owner of the equity of redemption in land sold on execution was at his mother's house at the time the certificate of sale was assigned to her and made no objection, and that the mother knew that a suit for divorce was pending against the son, do not tend to show that the mother's purchase was in trust for his benefit.

3. SAME—*when trustee is not disqualified from purchasing land.* The fact that the testator's wife is made trustee for the sole purpose of applying the rents of the land upon the mortgage indebtedness of the testator does not disqualify her from purchasing a certificate of sale for a portion of the land sold to satisfy a judgment against a devisee.

4. SAME—*when widow is entitled to the first \$500 received from rents and profits.* Where land is devised to the testator's son for life, burdened with a lien thereon for the sum of \$500 per annum to be paid to the testator's widow out of the rents and profits, the widow is entitled to the first \$500 received from rents and profits.

APPEAL from the Circuit Court of Moultrie county; the Hon. W. G. COCHRAN, Judge, presiding.

F. J. THOMPSON, and WHITLEY, FITZGERALD & McLAUGHLIN, for appellant.

E. J. MILLER, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

Minnie D. Riley, the appellee, (formerly Minnie D. Pyatt,) secured a decree of divorce and for alimony against Edward C. Pyatt in the district court of Chautauqua county, Kansas. She thereafter commenced an attachment suit in the circuit court of Moultrie county, Illinois, against Pyatt, based upon the said decree for alimony, and levied upon 160 acres of land as the property of Pyatt. Ann E. Pyatt, the appellant, filed an interplea, claiming title to the land by virtue of a sheriff's deed to 140 acres issued upon a certificate of sale which had been assigned to her by the Plano Manufacturing Company, and a sheriff's deed to 20 acres issued upon a certificate of sale which had been assigned to her by the purchaser at a sale under a judgment in favor of Spitler & Jennings. The circuit court adjudged that the title of appellant to the 140 acres was void and that her title to the 20 acres was valid. On appeal to this court the judgment of the circuit court finding the title to the 20 acres in appellant was affirmed, and in so far as it found appellant's title to the 140 acres was void the judgment was reversed and the cause was remanded to the circuit court for a new trial. (*Pyatt v. Riley*, 252 Ill. 36.) When the cause was re-docketed in the circuit court appellee obtained leave to file seven additional replications to the interplea, whereby she set up, in substance, that the naked legal title to the 140 acres was placed in appellant for the purpose of defrauding appellee out of the amount of alimony awarded her by said decree, and that appellant holds the title to the said 140 acres as trustee for Edward C. Pyatt.

It is urged that the court erred in permitting the additional replications to be filed, for the reason that on the first trial the only ground on which appellant's title was

attacked was that the judgments on which her sheriff's deeds were based were invalid, and that appellee should not now be permitted, after that matter had been litigated and determined against her in this court, to thus attack the title of appellant upon a new and entirely different ground. When the former judgment was reversed by this court the cause was remanded to the circuit court for a new trial. The cause was re-docketed in the circuit court, and appellee was entitled to a new trial pursuant to the mandate of this court and was entitled to amend her pleadings and present any additional defense she might have to appellant's claim. In passing upon this question in *Dinsmoor v. Rowse*, 211 Ill. 317, we said: "The rule is, that when a decree or judgment is reversed and the cause is remanded without specific directions the judgment of the court below is entirely abrogated, and the cause then stands in the court below precisely as if no trial had occurred, and the lower court has the same power over the record as it had before its judgment or decree was rendered, and may permit amendments to the pleadings and the introduction of other evidence, so long as the same are not inconsistent with the principles announced by the court of review and do not introduce grounds that did not exist at the hearing in the court below.—*Palmer v. Woods*, 149 Ill. 146; *Perry v. Burton*, 126 id. 599; *Rush v. Rush*, 170 id. 623." This has been the holding of this court ever since the decision in *Chickering v. Failes*, 29 Ill. 294. The court did not err in permitting the additional replications to be filed.

At the close of appellee's case, and again at the close of all the evidence, appellant requested the court to give a peremptory instruction directing the jury to find the issues in her favor, and the refusal of this instruction is assigned as error. The evidence offered on behalf of appellee tended to prove that E. A. Pyatt, the husband of appellant, died testate; that by his will he devised to his son, Edward C. Pyatt, during his natural life, and at his death to the heirs

of his body, the 140 acres of land involved as well as the 20 acres also involved on the former appeal; that the lands thus devised were charged with a lien for the sum of \$500 per annum, to be paid annually, out of the rents and profits thereof, to appellant until her death; that the will further provided that as a portion of his real estate was encumbered by mortgages and he might increase his mortgage indebtedness during his lifetime, and as he desired that one-fifth of such encumbrances should be borne by his grandchildren and the remainder equally by all his children, he appointed his wife as trustee, without bond, to take immediate possession of all his real estate and apply the proceeds of the same to the payment of such indebtedness until the same should be fully paid, and that the bequests made to his children and grandchildren should be suspended until the discharge of such indebtedness; that a certificate of sale of the 140 acres in question was executed and delivered by the sheriff to the Plano Manufacturing Company July 21, 1906, pursuant to a sale under execution against the lands of Edward C. Pyatt; that on or about July 17, 1907, this certificate of sale was assigned and transferred by the Plano Manufacturing Company to appellant for the sum of \$1111.88, and on October 31, 1907, the sheriff executed and delivered to her a deed to the land; that on April 22, 1907, appellant filed her final report as trustee under the will of her husband, which report was approved in the month of September following and appellant was discharged as such trustee; that on August 22, 1907, appellant received \$146.45 from the sale of oats, on September 1 \$120 for pasture, and from September 18 to September 25 \$224.48 for corn,—all from the 160 acres in question; that on June 17, 1907, appellee brought her suit for divorce against Edward C. Pyatt in the district court of Chautauqua county, Kansas, and on that day summons was served upon said Edward C. Pyatt; that on September 16, 1907, a decree of divorce was entered in that cause

and a decree for \$1000 alimony against Edward C. Pyatt; that during the latter part of June, 1907, Edward C. Pyatt visited appellant at her home in Decatur, Illinois, and remained there until about the middle of August; that while he was there his mother talked to him about the purchase of the certificate of sale from the Plano Manufacturing Company and he made no objection to the purchase; that at that time appellant knew that the divorce suit was pending in Kansas and had written appellee in reference to the trouble between her and her husband, in which letter she stated that no property that she had anything to do with would be "fooled away with lawyers;" that in the opinion of appellee the annual rental value of the land in question was seven, eight or nine dollars per acre.

Viewed in the light most favorable to appellee, this evidence falls far short of showing that the mere naked title to this 140 acres was vested in appellant and that Edward C. Pyatt was the beneficial owner. The mere fact that Edward C. Pyatt was present at his mother's home at the time the certificate of sale was assigned to her does not tend to prove that the transaction was for his benefit. The fact that appellant knew, at the time she purchased the certificate of sale, that the divorce suit was pending in Kansas has no bearing whatever upon the question whether she purchased the certificate for the benefit of her son.

Appellee assumes that the purchase and assignment of the certificate of sale was a transaction between appellant and Edward C. Pyatt, and seeks to invoke the rule which applies, when the rights of creditors are involved, to transactions between parent and child where fraud is alleged and where it is claimed that the consideration is grossly inadequate. This was not a transaction between appellant and her son. The Plano Manufacturing Company held the certificate of sale. Edward C. Pyatt had the right to redeem. Appellant had no rights in the premises whatever, and it

was entirely optional with the Plano Manufacturing Company whether it should sell and assign the certificate of sale to her. It does not appear that Edward C. Pyatt in any way participated in the negotiations leading to the sale and transfer of the certificate of sale, and in the absence of proof it will not be presumed that he did so, as the transaction was wholly between appellant and the holder of the certificate of sale.

It is contended that as appellant was acting as trustee under her husband's will and had not yet been discharged, the purchase of the certificate of sale by her inured to the benefit of her son. Appellant was appointed trustee under the will of E. A. Pyatt for the specific purpose of liquidating the mortgage indebtedness of the testator and for no other purpose. She was under no obligation as trustee, and indeed had no right, to use the funds of the estate, if any there were, to liquidate the indebtedness of Edward C. Pyatt.

There is no evidence whatever tending to show that Edward C. Pyatt is the beneficial owner of this property, and the peremptory instruction should therefore have been given.

As the cause must be remanded for another trial, it will be necessary to note some of the objections made to instructions given on behalf of appellee.

By the seventh instruction the jury were told, in substance, that though the common design is the essence of the charge of conspiracy, it is not necessary to prove that the defendants actually came together and agreed, in terms, to that design and to pursue it by common means, and that if they believed, from the evidence and circumstances proven, that Edward C. Pyatt and appellant talked about the transfer of the property to appellant before the transfer was made, and that both knew at that time that the transfer of said land to appellant would have the effect of

defrauding appellee and preventing her from collecting any decree which she might obtain against him, then, in law, both Edward C. Pyatt and appellant are deemed to have intended to work together in harmony, with the purpose in view of defrauding appellee. Other instructions were given to the same effect which directed a verdict for appellee. These instructions are clearly wrong. It was only in the event that the property was purchased for the benefit of Edward C. Pyatt and the title taken in appellant to defraud creditors that appellee was entitled to recover.

By another instruction the jury were told that as between appellant and her son she was not entitled to the rents and profits from the land in question until October 31, 1907,—the date of the sheriff's deed. By the will of E. A. Pyatt the 160 acres in question were devised to Edward C. Pyatt during his natural life, burdened with a lien thereon for the sum of \$500 per annum, to be paid annually out of the rents and profits. As between appellant and her son she was entitled to the first \$500 received from the rents and profits on the 160 acres, and the court erred in instructing the jury otherwise.

The court further instructed the jury that a conspiracy is an agreement made between two or more persons to do an unlawful act or to do a lawful act by unlawful means. This instruction was inapplicable to this case and should not have been given.

Other criticisms are made to the instructions given, but the same are without merit.

For the reasons given, the judgment of the circuit court is reversed and the cause is remanded for a new trial.

*Reversed and remanded.*

MARY HARTNETT, Appellant, vs. THE BOSTON STORE OF CHICAGO, Appellee.

*Opinion filed October 16, 1914—Rehearing denied Dec. 4, 1914.*

1. NEGLIGENCE—the essential elements of actionable negligence. The essential elements of actionable negligence are, first, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and third, a consequent injury so connected with the failure to perform the duty that the failure is the proximate cause of the injury.

2. SAME—what necessary to constitute proximate cause. To make a breach of duty the proximate cause of an injury the injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might occur as a probable result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act.

3. SAME—when negligence is not the proximate cause of an injury. If the negligence complained of does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury.

4. SAME—when violation of ordinance against selling guns to minors does not create liability. The mere violation of an ordinance prohibiting the sale of guns to minors does not render the seller liable for an injury caused by the purchaser, a boy fifteen years old, who, while shooting with the gun at a target on the fence in his back yard, shot a person walking in the alley, where there is no averment in the declaration that the purchaser of the gun was inexperienced in the use of fire-arms or unfit in anywise to handle or use them.

5. APPEALS AND ERRORS—when party need not state what he expects to prove. Where a question is in proper form and clearly admits of an answer relative to the issue and favorable to the party calling the witness, the party is not bound to state the facts proposed to be proved by the answer when an objection is sustained to the question unless the court requires him to do so.

6. SAME—when right to urge a ruling on evidence as error is waived. The right to urge as error a ruling on evidence is waived where the written motion for new trial makes no mention of any ruling on the admission or exclusion of evidence.



APPEAL from the Branch "D" Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. ALBERT C. BARNES, Judge, presiding.

R. WILSON MORE, and FRED B. HOVEY, (GEORGE H. MASON, of counsel,) for appellant.

MOSES, ROSENTHAL & KENNEDY, (HAMILTON MOSES, and WALTER BACHRACH, of counsel,) for appellee. •

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This is an appeal granted on a certificate of importance by the Appellate Court for the First District from a judgment of that court affirming a judgment of the superior court of Cook county in an action on the case brought by Mary Hartnett, appellant, against the Boston Store of Chicago, appellee, to recover damages alleged to have resulted from a violation of an ordinance of the city of Chicago which forbids the sale of fire-arms to minors. The judgment was in favor of the defendant and was entered on a verdict of the jury directed by the court.

The declaration consisted of a single count, which set out section 883 of an ordinance of the city of Chicago, as follows:

"Sec. 883. *Fire-arms—Minors.*—No person shall sell, loan or furnish to any minor any gun, pistol or other fire-arm, or any toy gun, toy pistol or other toy fire-arm in which any explosive substance can be used, within the city, under a penalty of not more than \$100 for each offense: *Provided*, that minors may be permitted, with consent of their parents or guardians, to use fire-arms on the premises of a duly licensed shooting gallery, gun club or rifle club, or to secure a permit to shoot game birds in accord-

ance with the provisions of section 1486 of chapter 39 of this ordinance."

It was then charged that the defendant, by its servants, negligently and carelessly, and in disobedience of the ordinance, sold to Oscar Soderquist, a minor of the age of fifteen years, a gun in which explosive substances could be used, together with certain cartridges to be used in said gun; that Oscar Soderquist caused the gun to be loaded with cartridges, and by means of the gun discharged a leaden bullet from the gun by reason of the negligence of the defendant in selling the gun and thereby placing it within the power of Soderquist to discharge the bullet from the gun, and that the bullet struck the plaintiff while she was passing along a public alley, causing injury and damage to her.

The plaintiff offered in evidence the ordinance, together with proof that the defendant sold to Oscar Soderquist, a boy fifteen years of age, a twenty-two caliber rifle and two boxes of cartridges; that Soderquist took the gun home and hid it for two days, and then took the gun out and put up a tin target on the fence in the back yard of his home and shot at the target, and that he missed the target and the bullet went through the fence and struck the plaintiff, who was walking in the public alley back of the fence, causing the injuries for which the suit was brought. Thereupon the defendant moved the court to instruct the jury to find it not guilty, and the court gave the instruction. The plaintiff moved the court to set aside the verdict and grant a new trial, and alleged as grounds therefor error in giving the instruction and that the verdict was contrary to the law and the evidence.

There are three essential elements in actionable negligence: First, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty; and third, a consequent injury so connected with the failure to perform the

duty that the failure is the proximate cause of the injury. What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. (Cooley on Torts,—3d ed.—99; *Chicago Hair and Bristle Co. v. Mueller*, 203 Ill. 558; *Seith v. Commonwealth Electric Co.* 241 id. 252.) The declaration alleged, and the evidence proved, the existence of a duty not to sell to any minor any gun in which an explosive substance could be used, within the city of Chicago, and the breach of that duty by the sale of the gun to the boy fifteen years old. It was also proved that an injury resulted to the plaintiff from the intentional act of the boy in loading the gun and shooting at a target, and the intermediate question between the injury and the sale was whether the two were so connected that the sale of the unloaded gun was the proximate cause of the injury. The ordinance creates an arbitrary rule based solely on the age of any person to whom a gun, pistol, toy gun, toy pistol or other toy fire-arm might be sold, and as age is one of the essential elements to be considered in anticipating probable consequences, it is not questioned but that it was within the power of the city to enact such an ordinance. It would be a violation of the ordinance to sell a gun to a young man within one day of twenty-one years old, although he might be most skillful, careful and experienced in the use of guns. The ordinance

does not prohibit the sale of cartridges or other explosive substances, and the mere sale and delivery to a minor of an unloaded gun could not produce such an effect as resulted in this case. If Soderquist had not had the gun he could not have loaded or fired it, but the injury did not result from the possession of the gun alone, but it was due to his want of care in the use of it. In considering the question whether the defendant, in selling the gun to Soderquist, might reasonably anticipate that some injury would result to some person by putting him in possession of the gun, there are other things than the mere question of age to be considered. A minor may reasonably be expected to exercise that degree of care which a person of his age, intelligence, capacity, discretion and experience would naturally and ordinarily use. (*Weick v. Lander*, 75 Ill. 93; *City of Chicago v. Keefe*, 114 id. 222; *Illinois Central Railroad Co. v. Slater*, 129 id. 91; *Illinois Iron and Metal Co. v. Weber*, 196 id. 526; *Star Brewery Co. v. Hauck*, 222 id. 348; *McGuire v. Guthmann Transfer Co.* 234 id. 125.) A boy fifteen years of age raised in the country might be perfectly competent to ride and handle horses although not well broken or to handle other animals, and to put him in charge of one would not lead a person to anticipate any injury, while to put a city boy in the same situation might be grossly negligent. Ordinances frequently prohibit the sale of fireworks to minors, but if a purchaser, although a minor, had been in the business of displaying fireworks, the sale to him, although in violation of the ordinance, would not justify a conclusion that the seller anticipated that a boy so skilled would carelessly handle them. If a boy fifteen years of age is wholly unacquainted with fire-arms and has had no experience in their use it would be quite probable that some harm to another would follow from his use of a gun, but a boy of that age who has been accustomed to the use of fire-arms may be far more careful and skillful in their use than the ordinary

adult, so that the probabilities of consequent injury do not depend solely upon the question of age. During the civil war there were 105,000 boys not over fifteen years old, more than 1,000,000 not over eighteen years old and more than 2,000,000 not over twenty-one years old in the Union army, and it was not considered that they were unfit to be trusted with fire-arms. Every one under twenty-one years of age would have come within the terms of this ordinance. It is common knowledge that the average adult unaccustomed to the use of a gun, when hunting, is a source of great danger to others not to be apprehended from a minor acquainted with fire-arms and their use under the same circumstances. If a boy fifteen years old is experienced in the use of guns and acquainted with their construction and the proper mode of carrying, handling and discharging them, and has been careful in their use, danger to others would not be reasonably anticipated by a person selling him a gun. The declaration merely alleged the existence of the ordinance, the sale of the gun and the act of Soderquist which resulted in injury to the plaintiff, and the other essential fact from which a jury might infer that the probable result would be that he would injure someone by his carelessness was omitted in allegation and proof. If a mere violation of the ordinance created a cause of action for any injury resulting from the carelessness of the purchaser, the declaration would have been as good if it had averred that Soderquist was twenty years old. The averment that he was fifteen years old added nothing to complete the supposed cause of action. An unloaded gun is not inherently dangerous, and the plaintiff was bound to allege and prove that her injury might reasonably have been anticipated as a consequence of the sale of the gun to Soderquist, but it was not alleged that there was anything in the character or disposition of Soderquist or such want of skill and experience as rendered it dangerous for him to have a gun. The evidence, when the court

directed the verdict, did no more than to show that the defendant created a condition by which the injury to plaintiff was made possible through the carelessness of Soderquist.

On the trial Soderquist was a witness for plaintiff and was asked a number of questions evidently designed to show that he had never owned a gun and was not accustomed to the use of fire-arms or experienced in that respect, and objections to the questions were sustained. Error is assigned on the ruling, and one reply is that the plaintiff made no offer of proof as to what the witness would answer. That does not justify the ruling, because where a question shows the purpose and materiality of evidence it is not necessary to state what the answer would be. If a question is in proper form and clearly admits of an answer relative to the issue and favorable to the party on whose side the witness is called, the party is not bound to state the facts proposed to be proved by the answer unless the court requires him to do so. (38 Cyc. 1330; *Buckstaff v. Russell*, 151 U. S. 626.) The plaintiff, however, filed a written motion for a new trial in which no mention was made of any ruling on the admission of evidence, and the objection and exception were thereby abandoned. (*Matthews v. Granger*, 196 Ill. 164; *Janeway v. Burton*, 201 id. 78.) The court, in the written instruction directing a verdict, advised the jury that the declaration failed to make any allegation that the minor in question was inexperienced in the use of fire-arms or unfit in anywise to handle or use them, and therefore omitted an element essential to constitute a legal cause of action. It is quite evident that the ruling on the evidence was based on the want of an allegation of that kind, and when the ruling was made, or at least when the view of the court became manifest in the instruction, a motion to amend the declaration, if made, ought to have been, and undoubtedly would have been, granted; but the plaintiff elected to stand on the claim

that an allegation and proof that the ordinance was violated was sufficient, in law, to connect the sale of the gun with the injury as the proximate cause.

The court did not err in directing a verdict, and the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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LILLIAN SCHRAG, who sued as LILLIAN ULLRICH, a minor,  
Defendant in Error, vs. THE CHICAGO CITY RAILWAY  
COMPANY, Plaintiff in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 3, 1914.*

1. EVIDENCE—*scientific books not admissible—extent to which they may be read from.* Scientific books are not admissible in evidence before a jury and cannot be read from to contradict an expert witness except where such expert assumes to base his opinion upon the work of a particular author, in which case the work may be read in evidence to contradict him. (*City of Bloomington v. Shrock*, 110 Ill. 219, followed; *Chicago Union Traction Co. v. Ertrachter*, 228 id. 114, explained.)

2. SAME—*when improper cross-examination will reverse.* In a personal injury case, where the only question is the extent of the plaintiff's injury and the chief witnesses for the defendant are two medical experts, who base their opinions upon their own observation and experience without referring to any text books or text writers upon the subject, it is reversible error to permit plaintiff's counsel to exhibit text books to the witnesses in the presence of the jury and so cross-examine them as to give the jury the impression the witnesses were testifying against recognized authority on the subject.

FARMER, J., dissenting.

WRIT OF ERROR to the Branch "B" Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. DUANE J. CARNES, Judge, presiding.

CHARLES LEROY BROWN, for plaintiff in error.

JAMES C. McSHANE, for defendant in error.

Mr. JUSTICE COOKE delivered the opinion of the court:

The defendant in error, Lillian Ullrich, who was then a minor, by William Ullrich, her next friend, brought suit in the circuit court of Cook county against the Chicago City Railway Company, plaintiff in error, to recover for injuries alleged to have been sustained in a street car accident in the city of Chicago. She recovered a judgment for \$5500, which was affirmed by the Appellate Court for the First District. The cause has been brought to this court for further review by writ of *certiorari*.

The points chiefly relied on for reversal are, (1) that the court permitted an improper use of medical books in the cross-examination of expert witnesses called on behalf of plaintiff in error; and (2) that the court erred in permitting the wife of the next friend to testify in behalf of defendant in error.

At the beginning of the trial in the circuit court the plaintiff in error stated that the motorman who was driving the car which caused the injury to defendant in error was dead, and as he was the only person by whom plaintiff in error could have proved the manner in which the accident occurred, it was in no position to offer any evidence on the question of liability, and it was admitted that the defendant was negligent. The only question left, therefore, was to determine the extent of plaintiff in error's liability, and the only controverted question on the trial was whether defendant in error suffered any serious injury.

It was the contention of plaintiff in error that, aside from some trivial bruises, the ailments from which defendant in error suffered after the accident were due wholly to conditions which existed prior to that time, and that the accident neither caused nor contributed to cause those ailments. On the other hand, defendant in error claimed



that before she was injured her health was good but that after the accident she suffered from hysteria and peritonitis, and that those afflictions were the result of the accident. Considerable evidence, both expert and lay, was introduced by the respective parties on this question. Evidence was introduced on behalf of plaintiff in error which tended to prove that defendant in error had suffered from hysteria prior to the time of the accident, and expert evidence was offered to show that the accident neither caused nor contributed to the hysteria which she suffered thereafter. Two expert witnesses were called on behalf of plaintiff in error who testified that hysteria can never be the result of or caused by accident but that it is congenital. Each of these witnesses based his opinion upon his own personal observations and experience and did not rely upon any text books or writers upon this subject. It was the theory of defendant in error that hysteria could be caused by an accident, and that it was so caused in this case and was known as traumatic hysteria. Upon the cross-examination of each of the expert witnesses called by plaintiff in error counsel for defendant in error was permitted, over objection, to ask the witness if there was not a difference of opinion among the authorities as to whether hysteria was hereditary or antedated convulsion; whether the witness knew of Dr. Johnson's work on surgical diagnosis,—counsel stating in this connection that he desired to show that hysteria may exist without any previous history or any previous disposition; whether it was not true that much less importance was attached by the Germans to the necessity of pre-disposition as a cause of hysteria than by the French; whether the witness' source of knowledge of hysteria upon which he was basing his opinion was derived entirely and solely from his own experience and not by consulting any of the authorities on the subject; whether his information was based upon the writings of recognized authorities on that subject; whether the witness was acquainted with what the authors

of the text books of schools of Europe and America said in reference to hysteria; whether the witness could give the name of a single book that lays down the proposition that hysteria may not result from traumatism; whether the witness was acquainted with Bailey's work on the diseases of the nervous system; whether he had read Starr's work on nervous diseases, and whether he was familiar with a book by Archibald Church on nervous and mental diseases. During this cross-examination counsel for the defendant in error exhibited, in the presence of the jury, various text books, stating, at times, the one he was reading from during the cross-examination, and at one time stating that he had all the books on the subject. When an objection was made to the question whether the witness could name a single book which states that hysteria may not result from traumatism, before the court could rule upon the objection counsel for defendant in error said: "Well, all right; if it is understood that he is not relying upon the writings of the world and the teachings of other men, but only upon his own experience, I am willing to let it go at that." At another time during the cross-examination, counsel for defendant in error, in explaining why he withdrew a question, made the statement: "I am not looking for errors; he (counsel for plaintiff in error) wants some little exception; I do not want him to have any exceptions."

The only question involved on the trial was the extent of plaintiff in error's liability. The two expert witnesses referred to were the chief witnesses called by plaintiff in error to support its theory that the disease from which defendant in error was suffering was not the result of the injuries received in the accident. This testimony was on a material question and was one of vital importance to plaintiff in error, and it was important that no error should intervene in the conduct of the cross-examination.

The law is well settled in this State that scientific books may not be admitted in evidence before a jury, and that

such books cannot be read from to contradict an expert witness except where such expert assumes to base his opinion upon the work of a particular author, in which case that work may be read in evidence to contradict him. In *City of Bloomington v. Shrock*, 110 Ill. 219, this question was involved and the authorities were reviewed at some length, and it was there so held. Among the reasons we gave in support of this holding were the following: "Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury and a book is produced recommending a different treatment, at most the repugnance is not of fact but of theory, and any number of additional books expressing different theories would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness but simply to prove a contrary theory."

Defendant in error relies upon *Chicago Union Traction Co. v. Ertrachter*, 228 Ill. 114, in support of the position that an expert witness may be cross-examined as to what the authorities say upon any particular subject. The rule as laid down in the *Shrock case*, *supra*, was in no respect changed by the holding in the *Ertrachter case*. This is evident from the fact that the *Shrock case* was cited and relied upon to support the holding in the *Ertrachter case*. In the *Ertrachter case* no attempt was made to contradict the expert witness. He was simply asked to state the names of medical authorities in support of the proposition to which he testified. In the case at bar counsel did not offer any of the medical works which he pretended to have

before him and which he used in the cross-examination of these witnesses, but he cannot be permitted to do indirectly that which he is not allowed to do directly. He succeeded in conveying the impression to the jury that these two witnesses were testifying against recognized authority on the subject of hysteria, and that is the only purpose which we can perceive counsel could have had in the use he was making of these various medical books. The cross-examination of these witnesses was improper and constitutes reversible error.

It is contended that the court erred in permitting the wife of the next friend to testify, upon the theory that the next friend was liable for costs and was therefore interested in the event of the suit. It is not necessary for us to determine whether the next friend was liable for costs, as at the opening of the trial counsel for plaintiff in error stated that the negligence was admitted and that the only question to be determined by the jury was that of the amount of damages to which the defendant in error was entitled. That precluded any possibility of a judgment against defendant in error or the next friend for costs. As Lillian Ullrich has in the meantime attained the age of her legal majority there will be no occasion for her appearance by a next friend in another trial, and this question will not arise.

For the reason given, the judgments of the circuit and Appellate Courts are reversed and the cause is remanded to the circuit court for a new trial.

*Reversed and remanded.*

Mr. JUSTICE FARMER, dissenting.

PHIL MITCHELL *et al.* Appellees, *vs.* THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

*Opinion filed October 16, 1914—Rehearing denied Dec. 4, 1914.*

This case is controlled by the decision in *Mitchell v. Chicago, Burlington and Quincy Railway Co.* (*ante*, p. 300.)

FARMER and VICKERS, JJ., dissenting.

APPEAL from the Circuit Court of Rock Island county; the Hon. R. W. OLMSTED, Judge, presiding.

JACKSON, HURST & STAFFORD, (M. L. BELL, of counsel,) for appellant.

J. T. KENWORTHY, and S. R. KENWORTHY, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This is one of two suits in ejectment begun on December 21, 1910, in the circuit court of Rock Island county by Phil Mitchell, William C. Wadsworth and Mary H. Wadsworth, executors of the will of Philemon L. Mitchell, deceased, to recover different portions of First avenue in front of lots 3 and 4 in block 1 in the old (or original) town of Stephenson, now a part of the city of Rock Island, on the ground that they owned the fee subject to the public easement. This suit was against the appellant, the Chicago, Rock Island and Pacific Railway Company, and the other was against the Chicago, Burlington and Quincy Railway Company, and the two were tried by the court without the intervention of a jury and at the same time and upon the same evidence. It appeared on the trial that William C. Wadsworth had died before the suits were begun, and the appellees, Phil Mitchell and Mary H. Wadsworth, became the only plaintiffs. The court found for the plaintiffs in each suit, and in this one entered judgment in their favor

for a strip of land occupied by the railroad tracks of appellant, 26.8/12 feet wide north and south by 200 feet long east and west, in front of lots 3 and 4 and extending to the center of Sixteenth street, which adjoins lot 4 on the west and intersects First avenue. Appeals were taken in both cases and an opinion has been filed in the other case, entitled *Mitchell v. Chicago, Burlington and Quincy Railway Co.* (*ante*, p. 300,) in which the facts proved, and the conclusion therefrom, are fully stated.

There is only one question raised in this appeal that was not presented in the other case, which is, that the plaintiffs were not invested by the will with the fee in the premises but merely had a power of sale with no right to the possession under the law, as stated in *West v. Fitz*, 109 Ill. 425, and *Emmerson v. Merritt*, 249 id. 538. In reply, counsel say that the objection was not presented to the circuit court and that it ought not to be entertained now, because the plaintiffs were the legal heirs of Philemon L. Mitchell as well as the executors of his will, and if they ought to have sued as heirs an amendment might have been made. We cannot find that the point was presented in any manner to the circuit court and it has not been mentioned in the argument of the case tried with this one. Whatever the fact may be, we have determined the issue between the parties on the merits, and inasmuch as the plaintiffs could not succeed in their suit, either as executors or heirs-at-law, we will not decide what estate they took under the will. A perfect defense was made under the Statute of Limitations of twenty years, and the evidence does not support the judgment.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

FARMER and VICKERS, JJ., dissenting.

O. R. BROOKS *et al.* Appellees, *vs.* FRANK L. HATCH *et al.*  
Appellants.

*Opinion filed October 16, 1914—Rehearing denied Dec. 9, 1914.*

1. DRAINAGE—*when limit of thirty cents per acre for annual assessment does not apply.* Under section 26½ of the Levee act, as amended in 1913, the limit of thirty cents per acre for the annual assessment does not apply to districts which had at the time of the amendment, or might thereafter have, pumping plants, the only limit in such case being that the amount cannot exceed the benefit to the land.

2. SAME—*effect where district has made no adequate provision for operating pumping plant.* The fact that a levee drainage district has made no adequate provision for operating a pumping plant does not preclude confirmation of an assessment to construct such plant and ditches leading thereto, as the commissioners have power, under sections 17½ and 26½ of the Levee act, as amended in 1913, to make adequate provision for such operation by annual assessments, and to do so is their imperative duty, which may, if necessary, be enforced by *mandamus*.

APPEAL from the County Court of Pike county; the Hon. PAUL F. GROTE, Judge, presiding.

WILLIAM MUMFORD, and JAMES H. MATHENY, for appellants.

W. E. WILLIAMS, and A. CLAY WILLIAMS, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court :

This is an appeal from a judgment of confirmation, by the county court of Pike county, of a special assessment for the construction of an additional pumping plant, an additional ditch, and some other work, in the McGee Creek Levee and Drainage District. The estimated cost of the proposed work was \$60,000. From the order and judgment directing the levying of the said assessment and an annual assessment of \$11,000 for maintaining the pumping

plants appellants prosecuted an appeal to this court. The judgment of the county court ordering the levy of a special assessment of \$60,000 for the proposed work was affirmed but that part of the judgment ordering an annual assessment of \$11,000 for maintenance and operation was reversed and the cause was remanded to the county court, with directions to sustain objections to the annual levy. (*Brooks v. Hatch*, 261 Ill. 179.) The cause was re-instated in the county court and a judgment rendered in accordance with the directions of this court, sustaining objections of appellants to the annual levy. The commissioners prepared and filed their assessment roll extending the \$60,000 against the various tracts of land in the district. The appellants filed objections to the assessment against their lands. The first four objections were substantially the same although phrased in different words. The objection presented by them was, that one of the purposes for which the special assessment was levied was the construction of an additional pumping plant, and no provision had been made, or was being made, for the expense of operating it, by an assessment of annual benefits or otherwise. Objections 5 and 6 were, that the assessment against the lands of appellants was greater than the actual benefits that would accrue from the proposed work and greater than their proportionate share. Objection 7 was, that none of appellants' lands would be benefited by the proposed work. On motion of appellees the first four objections were stricken from the files. A hearing was had upon the remaining objections by a jury, and a verdict was returned making an assessment of \$1670 against appellants' lands, which consist of more than 500 acres.

Counsel for appellants in their briefs say the errors assigned present the single question whether a special assessment should be confirmed when it is made for the construction of a pumping plant, and a ditch leading thereto depending upon the pumping plant for its efficiency, when



there is no fund on hand, no provision made or being made for its maintenance, and particularly when no provision has been made for the operation of the pump.

When the McGee Creek Levee and Drainage District was organized an annual assessment of thirty cents per acre was provided for maintenance and repairs. There are about 11,000 acres of land in the district, and this annual assessment would produce \$3300. Appellants offered to prove on the hearing that this sum was wholly insufficient to pay for repairs, maintenance and operation, that there were no funds on hand to pay the operating expenses of the pump, and that no provision had been made, or was being made, therefor. The court sustained objections to this offered evidence.

Section 17 of the original Levee act limited the assessment for annual repairs to thirty cents per acre on the lands of the district. This was retained in section 17½ of the amendment of 1885. Prior to 1905 there was no statute which expressly authorized the erection and maintenance of pumping plants in drainage districts. In 1905 an act was passed purporting to amend the Levee act, and authorizing the erection, maintenance and operation of one or more pumping plants, when necessary for the proper drainage of the lands of the district, out of funds raised by special assessment. This act was amended in 1907, and as amended authorized an assessment of sixty cents per acre for the maintenance and operation of a pumping plant or plants and the repair of drains and ditches. The act was again amended in 1911, and as amended authorized the levying of such annual amount of benefits for operating pumping plants and maintaining and repairing ditches and levees as the court found would accrue to the lands and were necessary for those purposes. No limit was placed on the annual amount of the levy except the necessities of the district and the benefits to the land. All three of these acts were held invalid in *Brooks v. Hatch*, *supra*, in not complying with

the requirements of section 13 of article 4 of the constitution. In that case it was further held that the erection and operation of a pumping plant, where necessary for the complete and successful drainage of the lands in the district, was authorized by the Levee act, and, of course, the annual assessment may be used to pay the expenses of operation of the pumping plant as well as the repair of the levee and ditches. It is true, as contended by appellants, that unless means are provided for the operation of the pump no benefit would result to the lands by reason of its being installed in the district. If the annual assessment of thirty cents per acre, provided for upon the organization of the district, is conceded to be insufficient to keep the pump in operation and the levee and ditches in repair, we do not think such fact would render erroneous the judgment confirming the assessment in this case. That the lands of the district would be benefited to the amount of the estimated cost of the work (\$60,000) was determined on the former appeal.

It is conceded in the brief of appellants that their lands were impartially assessed for no more than their fair proportion of the cost of the proposed work and no more than the benefits they would receive from the proposed improvements if the same are operated and maintained, but it is contended "that the order for special assessment for construction is dormant and its enforcement is improvident and illegal without proper proceedings for an annual assessment for maintenance and operation." The original petition in this case for an assessment of \$60,000 for the establishment of an additional pumping plant, the construction of an additional ditch, and other work, was filed in September, 1912. In 1913 the legislature amended sections 17½ and 26½ of the Levee act. As amended, section 17½ provides that if an annual assessment made at the time of the original organization of the district is thereafter found to be insufficient, it may be increased in the manner provided for the

levying of additional assessments. That section limits the amount of the annual assessment for keeping the levee or ditches in repair to thirty cents per acre on all the lands in the district. Prior to 1913 section 26½ provided that where a levee or ditch had been theretofore built under any law of this State or might thereafter be built under the act of which said section formed a part, the annual amount of benefits for keeping the same in repair should be due and payable on the first of September each year, and it was made the duty of the court in which the proceedings were had, to require the commissioners to report the condition of the levee or ditch at its July term each year, together with their estimate of the amount necessary to keep the levees or ditches in repair and pay all necessary and incidental expenses for the ensuing year, provided the amount collected under the order of the court should not, in the aggregate, amount to a greater sum in any one year than thirty cents per acre upon all the lands within the district. Immediately following the provisions quoted in substance, this language was added by the amendment of 1913: "Except in districts which now have, or may hereafter have, pumping plants, in which districts the annual amount of benefits collected each year shall be a sum sufficient to keep the levees, ditches, drains and other works of said district, in repair and to maintain in operation such pumping plant or plants."

By this amendment the limit of thirty cents per acre does not apply to districts which had at the time of the amendment, or might thereafter have, pumping plants. If the annual assessment levied at the organization of the district shall be found insufficient to keep the levee and ditches in repair and operate the pumping plant, under section 17½, as amended in 1913, the amount may be increased by the levying of an additional assessment. The additional levy under section 26½ may be of a sum sufficient to keep the levees and ditches in repair and maintain in operation the pumping plant. The amount that may be levied in a dis-

tract having a pumping plant or plants is limited only to a sum sufficient for that purpose, which, of course, could not, in any event, exceed the benefits to the land from such assessment. Independent of section 37, a discussion of which we do not think necessary to a decision of this case, it seems clear the McGee Creek Levee and Drainage District has full power and authority to provide, by annual assessment, means for operating its pumping plants if the provisions heretofore made prove insufficient. We do not understand this to be controverted by appellants, but their contention is that no sufficient fund has been provided for operating the pumps, and that such fund must be definitely and legally provided at the time when the assessment for the pump is made and confirmed. If appellants are right in this contention it would seem to follow that an assessment made for the construction of levees and ditches upon the organization of a drainage district could not be confirmed unless at the same time an annual assessment were made for repairs, and, so far as we are advised, this has never been held to be the law. But if that were otherwise an open question, it seems to be settled by section 17½ as amended in 1913, which provides that if an assessment of annual benefits is not made at the time of the original organization of the district, or if it is then made and thereafter found insufficient, an additional assessment may be levied.

Under the statute in force at the time the judgment of confirmation in this case was rendered the drainage commissioners had ample power to provide means necessary to operate the pumping plants, and it was and is their duty to make such provision. In *Peotone Drainage District v. Adams*, 163 Ill. 428, it was held that *mandamus* would lie against the commissioners to compel them to deepen, alter and change a drain so as to furnish the petitioner a sufficient outlet for the drainage of his land in the district. The district in that case was organized under the Farm Drain-

age act. In *Bromwell v. Flowers*, 217 Ill. 174, the court considered the right of a land owner to a writ of *mandamus* to compel the commissioners of a district organized under the Levee act to clean out, deepen and repair a lateral ditch through petitioner's lands, or, in case there was not sufficient money for that purpose on hand, that the commissioners be ordered to take the necessary steps to provide it in the manner required by law, and when provided, to use it to clean out, deepen and repair the ditch. A demurrer was sustained to the petition by the trial court, and that judgment was affirmed by this court on the ground that the commissioners were invested with some discretion in the levying of an assessment to clean out and repair ditches, and it did not appear from the petition that the discretion of the commissioners had been abused or an injustice done the petitioner, but it was there held, in substance, that if the refusal of the commissioners is arbitrary and amounts to an abuse of discretion or a fraud and works injustice, relief may be granted by *mandamus*. *Binder v. Langhorst*, 234 Ill. 583, was an action brought by a land owner against the commissioners of a drainage district organized under the Levee act, for damages claimed to have resulted from the neglect and refusal of the commissioners to construct a ditch of sufficient capacity to properly drain the plaintiff's land. The court held the action would lie, and after referring to *Peotone Drainage District v. Adams*, *supra*, said: "The obligation and the power of the commissioners are the same under the Levee act as under the Farm Drainage act. The language conferring authority is not the same and the method of assessment is different but the duty to provide drainage for the lands is just as imperative."

Under the above cited authorities it would seem clear that it is the imperative duty of the commissioners to provide means for operating the pumps. It is true, as asserted by appellants, that no benefits can result from the establishment of pumps unless they are operated. The commis-

sioners are bound to make provision for such operation, and this duty is not discretionary. In that respect it is unlike the duty imposed upon the commissioners to keep the ditches in repair, for the necessity of that work is one about which opinions might differ, but we have seen it has been held that where the refusal of the commissioners to repair or provide means to repair ditches is fraudulent, arbitrary, oppressive or unjust, an action for the writ of *mandamus* will lie. The necessity for providing means for operating the pumps admits of no difference of opinion, although opinions might differ as to the amount of money needed for that purpose. The statute confers power upon the commissioners to provide the necessary means to operate the pumps, and where the means already provided prove insufficient, to provide additional means, and it is the imperative duty of the commissioners to exercise this power and provide funds to operate the pumps. If they fail, voluntarily, to exercise this power and perform their duty in that regard its performance may be compelled by a land owner or owners by *mandamus*.

Appellants cite *Village of River Forest v. Cummings*, 261 Ill. 228, *City of Chicago v. Kemp*, 240 id. 56, and other like cases. Those were special assessment cases under the Local Improvement act. The ordinances authorizing the improvements, and upon which the special assessments were based, only provided for a part of the improvements. The lands were assessed on a basis of benefits as if each ordinance had provided for the entire improvement, and this was held erroneous. If we are correct in the reasons heretofore given for our conclusions, those cases are not applicable here.

The judgment of the county court is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Richard Williams *et al.* Appellants, *vs.*  
ROLLA M. DARST *et al.* Appellees.

*Opinion filed October 16, 1914—Rehearing denied Dec. 8, 1914.*

1. *QUO WARRANTO*—when a plea is to be taken as extending to whole information. The course of pleading in *quo warranto* is the same as in other forms of actions at common law, and hence a plea to the information is to be taken as extending to the whole charge of the information, unless it is expressly limited, in its beginning, to a part of the charge, only.

2. *SAME*—when motion for judgment *nil dicit* is properly denied. A motion for judgment *nil dicit* on a plea to an information in *quo warranto* is properly denied, where the plea is not limited to a part of the charge, only, but is filed to the whole information, and if good in substance it constitutes a defense both to the charge of usurping the office of drainage commissioners and to the charge of usurping the corporate powers, privileges and franchises of a drainage district.

3. *SAME*—when benefit of motion to strike portions of plea is waived. The benefit of a motion to strike portions of a plea to an information in the nature of *quo warranto* is waived, where the matters complained of are of such a character that full advantage can be taken of the same by special demurrer and a special demurrer is filed.

4. *SAME*—plea of justification must affirmatively show a valid title to office. In a proceeding in the nature of *quo warranto* the defendant must either disclaim or justify, and if he justifies his plea must show affirmatively a valid title to the office, and if the plea seeks to justify by some proceedings in court it must show jurisdiction in that court of such proceedings.

5. *SAME*—when order organizing drainage district may be attacked in a *quo warranto* proceeding. If the final order organizing a levee drainage district was entered by the county court after it had lost jurisdiction such order may be attacked in a *quo warranto* proceeding, notwithstanding section 16 of the Levee act gives the land owners a remedy, by appeal or writ of error, to review such final order.

6. *SAME*—when land owners are not estopped to attack final order organizing drainage district. Land owners are not estopped to attack the final order organizing a levee drainage district, where their only participation in the proceedings after the order was made was on the hearing of the matter of assessments and benefits, at which time they appeared specially and limited their appearance to questioning the jurisdiction of the court to proceed.

7. DRAINAGE—*what should be contained in the petition.* The Levee act contemplates that the petition to organize a district shall describe the proposed improvement with sufficient certainty to enable the land owners to judge of the necessity and propriety of the proposed work and of the advantages or disadvantages which will result from the proposed improvement, and it does contemplate that the details of the practical construction of the work shall be set forth.

8. SAME—*when court loses jurisdiction to enter final order.* If the county court, after appointing commissioners on a petition to organize a levee drainage district, fails to continue the cause to a day certain it loses jurisdiction, and its subsequent final order organizing the district is a nullity and may be attacked in a *quo warranto* proceeding.

9. APPEALS AND ERRORS—*matters not a part of the record can not be considered.* The Supreme Court is a court of review and on appeal can consider only such matters as are a part of the record and proceedings in the court below.

APPEAL from the Circuit Court of McLean county; the Hon. C. D. MYERS, Judge, presiding.

MILES K. YOUNG, State's Attorney, and W. B. LEACH, (CHAS. L. CAPEN, LESTER H. MARTIN, F. Y. HAMILTON, and WIGHT & ALEXANDER, of counsel,) for appellants.

WELTY, STERLING & WHITMORE, and A. M. HESTER, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an information in the nature of *quo warranto* by the State's attorney of McLean county, Illinois, in the circuit court of that county, on the relation of Richard Williams and sixteen other land owners and residents of the county, the majority of whom are owners of land in an alleged drainage district, against Rolla M. Darst, Henry A. Welch and William McKever, requiring them to show by what warrant or right they exercise the corporate powers, privileges and franchises of drainage commissioners of a



supposed drainage district known as the Mackinaw Drainage District, in that county. The object of the proceedings is to test the legality of the organization of the drainage district, which includes land both in McLean county and the adjoining county of Ford.

The information contains two counts. The first count charges appellees with usurping and exercising the corporate powers, liberties, privileges and franchises of a supposed drainage district known as the Mackinaw Drainage District, in McLean county, and requires them to show by what warrant they exercise such corporate powers, privileges, liberties and franchises. The second count charges the appellees with unlawfully holding and executing the rights, powers, duties and privileges of drainage commissioners of a supposed drainage district known as the Mackinaw Drainage District, and requires them to show by what warrant they hold, use and enjoy such corporate powers, privileges, liberties and franchises, and by what warrant or right they claim to hold, use and execute the powers, liberties and privileges of such drainage commissioners. Appellees appeared and filed a plea of justification to the information, in which they set forth certain proceedings had under the Levee act in the county court of McLean county, resulting in a final order in that court declaring certain territory therein described organized into a drainage district, known as the Mackinaw Drainage District, in that county. Thereupon appellants moved for judgment *nil dicit* as to the second count of the information, which motion the court overruled. Appellants then moved to strike out certain portions of the plea, which motion the court also denied. Thereupon appellants filed a special demurrer to the plea. The court overruled the demurrer, and appellants electing to abide by their demurrer, the court entered judgment on the demurrer in favor of appellees, finding the respondents not guilty and taxing the costs to the relators. This appeal followed.

The errors assigned are: (1) That the court erred in denying the motion of the People for judgment *nil dicit*; (2) that the court erred in denying the People's motion to strike out certain portions of appellees' plea; (3) that the court erred in overruling the People's demurrer to appellees' plea; (4) that the court erred in rendering judgment in favor of the appellees and against the People; and (5) that the court erred in rendering judgment against the relators for costs. The errors assigned will be considered in the order above indicated.

The plea, on its face, purports to answer the whole information. It sets forth the filing of the petition in the county court for the organization of the drainage district and the order entered thereon appointing appellees commissioners to lay out and construct the proposed improvement, as provided by section 5 of the Levee act. (Hurd's Stat. 1913, p. 922.) It also sets forth certain proceedings thereafter had in the county court, resulting in an order in that court declaring the territory over which appellees are assuming to exercise jurisdiction as drainage commissioners organized into a drainage district, known as the Mackinaw Drainage District, in that county. It will thus be seen that the plea filed is to the whole information, and, if good in substance, constitutes a defense both to the charge of the usurpation of the office of drainage commissioners and of usurping the corporate powers, privileges and franchises of a drainage district. Under these circumstances it would have been error to allow the motion. Under our statute the course of pleading is the same in *quo warranto* as in other forms of action at common law. (*People v. Heidelberg Garden Co.* 233 Ill. 290.) The rule at common law is that a plea is to be taken as extending to the whole of the charge in the declaration, unless it is expressly limited, in its beginning, to a part of the charge, only. (Gould's Pl.—5th ed.—355.) The plea in question contained no such limitation but both in its form and subject matter

went to the whole information. The motion for judgment *nil dicit* was therefore properly denied.

The matters complained of in the motion to strike out portions of the plea were of such a character that full advantage could be taken of the same by special demurrer. Appellants subsequently filed a special demurrer to the plea, and thereby waived the benefit of their motion to strike. The third assignment of error therefore presents no question that is subject to review by this court at this time.

Appellants argue that the petition filed in the county court for the organization of the district was insufficient to give jurisdiction to that court to entertain the proceedings. The objections urged to the petition are: (1) That it did not describe with sufficient minuteness the starting point, route, terminus, and the nature and plan of the proposed improvement; and (2) that it did not conclude with a formal prayer for the organization of the drainage district to be known as the Mackinaw Drainage District. The petition asks that a drainage district be formed for a combined system of drainage, independent of levees, to be known as the Mackinaw Drainage District, which should include certain lands therein described, and gives the starting points, routes and termini of the open ditch and the tile drain it is proposed to construct, the tracts of land through which the ditches will pass, and the general plan, scope and nature of the proposed improvement. Attached to and made a part of the petition is a plat of the proposed drainage district, on which are shown the lands included in the district and the starting points, courses and termini of the proposed open ditch and the tile drain. The petition further states that in constructing the open drain the channel of Mackinaw creek is to be followed so far as practicable, and that said creek is to be widened, deepened and freed from brush, driftwood, sediment and all other accumulations. The statute does not contemplate that these matters shall all be minutely set forth and described

in the petition, nor does it contemplate that the matter of the practical construction of the improvement shall be fully determined in advance of the filing of the petition, but that matter is left for the determination of the commissioners subsequently to be appointed. (Hurd's Stat. 1913, chap. 42, secs. 9-11.) What the statute contemplates is that the petition shall describe the proposed improvement with sufficient definiteness to inform the land owners who are to be specially assessed to pay for its cost what is proposed to be done, so as to enable them to judge as to the necessity and propriety of the work proposed and of the advantages and disadvantages that will result from the construction of the proposed improvement. (*Aldridge v. Clear Creek Drainage District*, 253 Ill. 251; *Brady v. Hayward*, 114 Mich. 326; *Kinnie v. Base*, 68 id. 625; *Dodge County v. Acom*, 61 Neb. 376.) In our opinion the petition was sufficiently specific in this respect. The objection as to the omission of the formal prayer for the organization of a drainage district to be known as the Mackinaw Drainage District from the conclusion of the petition is one as to matter of form and too hypercritical to require any serious consideration from this court in a proceeding of this character. The petition filed fully sets forth all of the essential requirements of the statute, including a request that the district be known as the Mackinaw Drainage District. That is all the statute requires. It was sufficient, in substance, to give the county court jurisdiction of the subject matter of the proceedings.

It is further argued that such irregularities occurred in the course of the proceedings that the county court lost jurisdiction of the cause before it entered the final order declaring the district organized and that such order is therefore void. The irregularities complained of are (1) the permitting of the petition to be amended, over the objections of certain of the petitioners; (2) the permitting of the commissioners to amend their report without referring

the same back to the commissioners for correction; and (3) the continuing of the hearing on the report of the commissioners without continuing the same to a day certain, as required by section 13 of the Levee act. (Hurd's Stat. 1913, p. 925.) In view of the conclusion we have reached as to the third objection it will not be necessary to consider the other two. The petition for the organization of the district was filed in the county court on October 10, 1912. Due notice was given of the hearing on the petition, and on April 12, 1913, the county court entered an order finding the jurisdictional facts as to the sufficiency of the petition and the giving of notice, etc., granted the prayer of the petitioners and appointed appellees commissioners of the drainage district to lay out and construct the improvement. The order set out in the plea does not, however, fix a day for the filing of their report by the commissioners, as required by section 13 of the Levee act, and there is no allegation in the plea that any time was, in fact, so fixed by the court for the filing of such report by the commissioners. The commissioners, however, filed their report on July 26, 1913, recommending that certain changes be made in the proposed improvement and that additional lands (describing them) be taken into the district. The court then fixed upon August 22 as the day for the hearing on such report, and due notice was given of such hearing both by publication and by posting, as required by statute. No hearing, however, appears to have been had on that day. On September 4 the commissioners obtained leave to amend their report so as to bring in new parties, and the court continued the hearing on the amended report to October 6, and due notice was given of such hearing by publication and by posting as before, but no hearing appears to have been had on that day, and the record of the county court as set forth in the plea fails to show, and there is no allegation in the plea, that the court then continued the hearing to a future day, although such proceedings were

had that a further amendment was made to the report of the commissioners. On November 29, 1913, the court entered the final order declaring the district organized.

Appellants insist that as the plea fails to allege that at the time the court appointed the commissioners it fixed upon July 26, 1913, or any other day, as the day for its hearing on the commissioners' report, as required by section 13 of the Levee act, or a continuance of such hearing from October 6 to November 29, the plea is fatally defective in those respects and constitutes no defense to the action. The rule is, that in proceedings in the nature of *quo warranto* the defendant must either disclaim or justify, and that if he justifies, his plea must affirmatively show on its face a valid title to the office. (*People v. Karr*, 244 Ill. 374; *People v. O'Connor*, 239 id. 272; *Place v. People*, 192 id. 160.) When the plea seeks to justify by virtue of proceedings had in a court or before some other body designated by law, the plea must show jurisdiction in that court or other body of the proceedings by which the municipal body was organized. (*People v. Feicke*, 252 Ill. 414.) In *Merkle Drainage District v. Hathaway*, 260 Ill. 186, we held that a district could not be finally organized under the Levee act until after the hearing on the commissioners' report, and that if the court, after appointing the commissioners, failed to continue the cause to a day certain it lost jurisdiction of the cause and no one was bound by its subsequent orders entered therein. It was there said: "The district cannot be finally organized until after the hearing on the report of the commissioners, and, as is seen by the section of the statute referred to, [section 13 of the Levee act,] the court is required to continue the cause to a day certain for the hearing on this report by entering an order on the hearing on the petition, and by failing to fix a day for the hearing on the report of the commissioners the court lost jurisdiction to proceed further, and no one was bound by the action of the court in entering its

order on July 2 or in entering the subsequent order organizing the district. The organization of a drainage district is a statutory proceeding, and every essential step required by statute is necessary to the jurisdiction of the court organizing such district and must appear affirmatively of record.—*Aldridge v. Clear Creek Drainage District*, 253 Ill. 251." A judgment entered after the court has lost jurisdiction in the cause is, a nullity and may be attacked at any time by any person and in any court or proceeding. *Aldridge v. Matthews*, 257 Ill. 202.

Appellees argue that the validity of the final order can not be questioned in a *quo warranto* proceeding, for the reason section 16 of the Levee act provides for a method of review of such final order by direct appeal or writ of error to this court, and they cite *People v. Niebruegge*, 244 Ill. 82, as sustaining such contention. That case is not in point here. There the plea showed on its face that the county court had jurisdiction both of the person and the subject matter of the cause, and that the final order entered organizing the district found the court had jurisdiction both of the person and the subject matter of the cause. Such is not the case here, where the final order contains no such finding, but, on the contrary, shows that the cause was continued from time to time for a hearing on the commissioners' report, and wholly fails to show that such continuances were to a day certain, as required by sections 13 and 15 of the Levee act, or that the hearing on November 29 was held pursuant to a previous continuance granted to that day. The final order being one which at the time it was entered the county court was without jurisdiction to enter, the validity of the organization of a drainage district depending upon such void order may be attacked in a *quo warranto* proceeding, notwithstanding the statute gives the land owners a remedy by appeal or writ of error to review such final order. In *Aldridge v. Matthews*, *supra*, it is said: "A judgment of a court entered without jurisdiction is a

nullity, and may be called in question at any time and by any person without resorting to an appeal or writ of error to secure a reversal. Such a judgment, being void, may be ignored or disregarded by any person not estopped in some way or precluded by his own act from questioning it. There was no evidence that any signer of the petition or those whom they included in the drainage district were estopped in any way or under any disability to assert the void character of the former order."

The rule above announced is decisive of the case at bar unless the relators have been guilty of such conduct as to estop them from now questioning the legality of the organization of the drainage district. This appellees insist they have done by reason of their participation in certain of the proceedings in the county court for the organization of the district, and by their objections filed on the application of the county collector for judgment and order of sale of their lands for alleged delinquent taxes levied and assessed by this drainage district. The plea, however, fails to show that any of the relators or any other land owners participated in any of the proceedings for the organization of the district subsequent to August 30, 1913, except on the hearing of the matter of the assessment of benefits and damages, at which time some of the relators appeared specifically and limited their appearance to that of questioning the jurisdiction of the court to further proceed in the cause. By thus appearing specially to question the jurisdiction of the court the relators waived none of their rights in the premises and did not re-invest the court with the jurisdiction which it previously had lost.

The proceedings in the county court on the application for judgment and order of sale are not set forth in the plea, and the transcript of the proceedings had at that time is no part of the record in this case and cannot be considered on this appeal. This is a court of review, and the appeal brings before us only such matters as were a part



of the record and proceedings of the court below. No other matters will be considered here. (*Soule v. People*, 205 Ill. 618.) The transcript was not transmitted to this court by virtue of any order of the judge of the lower court made in accordance with the rules of this court, and its contents cannot be considered in reaching our conclusion as to the sufficiency of the plea filed in the circuit court in an entirely different proceeding.

As we are of the opinion that, in so far as anything contained in this record shows, the county court was without jurisdiction to enter the final order of November 29, 1913, and that the relators have not in any way estopped themselves from questioning the legality of the organization of the district by *quo warranto*, the judgment of the circuit court of McLean county will be reversed, with directions to that court to sustain the demurrer to the plea.

*Reversed and remanded, with directions.*

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HENRY YOTT *et al.* Plaintiffs in Error, *vs.* ELIZA YOTT *et al.* Defendants in Error.

*Opinion filed October 16, 1914—Rehearing denied Dec. 8, 1914.*

1. WILLS—*what is necessary to entitle heirs to contest validity of probate of will.* Where a testator, after making a will leaving his estate to persons not related to him by blood, subsequently conveys all of his estate to the same persons, the heirs of the testator are not "persons interested" who may attack the validity of the probate of the will upon the ground that it was revoked by the conveyances, unless they allege and prove that the conveyances were invalid.

2. SAME—*questions of validity of conveyances and their effect as a revocation of the will may be joined in one bill.* Where a testator devises all of his estate to persons not related to him by blood and subsequently conveys all of his estate to the same persons, the heirs of the testator may join in one bill the questions of the validity of the conveyances and their effect as a revocation of the will, as it is only by establishing the invalidity of the con-

veyances that the heirs can have any standing, as "persons interested," to attack the validity of the probate of the will.

3. SAME—*when deed does not revoke will as to the lands conveyed.* A conveyance by the testator of lands he has specifically devised revokes the will as to the lands conveyed, but such act must be the result of a sound mind and free will, and if the conveyance was procured by fraud or undue influence or the grantor was mentally incompetent the conveyance does not operate to revoke the will.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. JESSE A. BALDWIN, Judge, presiding.

JAMES R. WARD, for plaintiffs in error.

WINSTON, PAYNE, STRAWN & SHAW, (JOHN BARTON PAYNE, EDWARD W. EVERETT, and R. S. TUTHILL, JR., of counsel,) for defendants in error.

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiffs in error filed a bill to set aside the probate of the will of Francis Yott, whose heirs they were, on the ground that the will was abrogated and revoked by subsequent conveyances of all his real and personal estate, leaving nothing for the will to operate upon. The cause was submitted to the court, and this writ of error is prosecuted to review the decree, which dismissed the bill for want of equity.

The will devised and bequeathed all of the real and personal property of the testator to persons who were not related to him by blood. The subsequent conveyances transferred the title of all his property for the benefit of the same persons but upon different limitations. These persons were defendants to the bill. The testator left no widow, descendant or parent, and the complainants are his next of kin, who take nothing under either the will or the subsequent conveyances.

Section 17 of the Statute of Wills provides that "no will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no word spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

The contention of the plaintiffs in error is that by the common law a will may be revoked and abrogated by implication by a conveyance of the property affected in the testator's lifetime, and that this rule is not abrogated by the section of the statute cited. Plaintiffs in error are not, however, in a position to raise this question. Section 7 of the Statute of Wills authorizes any person interested to contest the validity of the probate of any will. It is only by virtue of this section that the heirs of a decedent may institute such a contest. They are persons interested, because if the will were not valid they would inherit the estate. If, however, the will is invalid only because it has been revoked by a subsequent valid conveyance of the property involved the heirs are not interested, because they would not inherit the estate even with the will out of their way but the property would go to the grantees in the conveyance. It is only upon the theory that the subsequent conveyances were invalid that the heirs could have any interest in the estate, and the plaintiffs in error averred their invalidity.

The cause was heard upon an amended bill, answer, replication and evidence produced in open court. In both the original and amended bills the mental incapacity of the testator and the undue influence of Eliza Yott, one of the beneficiaries under the will and one of the grantees in the conveyances, was averred both at the time of the execution of

the will and at the time of the execution of the conveyances, and it was averred that by reason of such mental incapacity and undue influence all of the instruments were invalid. The answer denied the mental incapacity of Francis Yott and the undue influence of Eliza Yott and alleged that both the will and the conveyances were valid. At the hearing counsel for the complainants stated that he would not introduce any testimony upon the issues of testamentary capacity or undue influence, but would rely upon the fact that the testator had disposed of all of his property upon which the will could operate.

It is insisted by the plaintiffs in error that the determination of the validity of the conveyances was not necessary to the decision whether the will was abandoned, abrogated and revoked by the testator. That proposition can not be true in this case, for it was necessary, in order to give the plaintiffs in error any standing in court, for them to establish the invalidity of the conveyances, since otherwise they had no interest in the property.

It is argued that this suit invokes only the jurisdiction conferred by statute for the contest of wills and not the general equity powers of a court of chancery; that the question of the validity of the conveyances was not germane to the bill, and that to include such question in the bill would make it multifarious. On the contrary, it was necessary to the exercise of the jurisdiction conferred by the statute that the conveyances should be decreed invalid and set aside. This fact was a necessary part of the cause of action of the complainants, and the two questions of the validity of the conveyances and their effect as a revocation of the will were proper to be joined in one bill, (*Stephens v. Collison*, 249 Ill. 225,) and they were so joined in the pleading.

It is not argued on behalf of the plaintiffs in error that the evidence shows the conveyances were invalid. In fact, evidence was not introduced on that issue, but it is argued

here that it is immaterial in this suit to contest the will whether the instruments in writing subsequently executed by Francis Yott, the testator, were valid and effective or not, and it is stated that the validity of those instruments was not submitted to the circuit court for determination and could not properly be submitted in a suit to contest the will under the statute. It has been shown that it was essential for the plaintiffs in error to establish the invalidity of the conveyances to show that they had an interest in the estate. They alleged it but failed to sustain the allegation.

It is insisted that the testator at the time of his death owned personal property of the value of \$321.80 which he acquired after the making of the deeds, and that if the deeds revoked the will this property descended as intestate estate to his heirs. Conceding that the plaintiffs in error were entitled to raise the question of the revocation of the will, it must be decided against them. A conveyance by a testator of lands which he has specifically devised by his will revokes the will as to the lands conveyed. (*Phillippe v. Clevenger*, 239 Ill. 117.) The reason is, that the act of the testator subsequent to its execution shows an intention inconsistent with the will. Such an act must be the result of a sound mind and a free will. A deed procured by fraud or undue influence or executed by one who is mentally incapacitated does not show such an intention and cannot operate as a revocation of a will. (*Smithwick v. Jordan*, 15 Mass. 113; *Graham v. Burch*, 47 Minn. 171.) The bill alleged that the deeds were executed while the testator was of unsound mind and were procured by fraud and undue influence. The court could not have rendered a decree finding the will revoked by deeds so procured or executed, and could not have rendered a decree based upon a finding, contrary to the allegations of the bill, that they were not so procured or executed.

The decree of the circuit court was right, and it is affirmed.

*Decree affirmed.*

J. EDWARD KINSELLA, Appellant, *vs.* STEPHEN STEPHENSON *et al.*—(ABE OLDS and L. P. SWANNELL, Appellees.)

*Opinion filed October 16, 1914—Rehearing denied Dec. 9, 1914.*

1. CLOUD ON TITLE—*when grantee of a fractional quarter does not take title to center of river.* Where land is conveyed as a government subdivision as a certain fractional quarter section and is shown on the surveyor's plat as fractional because of temporary overflow from the river, which, at its ordinary stage, is outside of the quarter section lines of the fractional quarter, and these lines can be ascertained from monuments and the lines of other subdivisions fixed by the surveyor, such grant will not extend beyond the quarter section line.

2. SAME—*when title cannot be claimed by alluvion or accretion.* A large body of land lying between the meander line of a fractional section and a river, which land is overflow land, from which the water recedes when the river is at its normal stage, can not be treated as being a part of the fractional section by alluvion or accretion.

3. SAME—*what is necessary to establish title by twenty years' possession.* To establish title, by limitation, by twenty years' possession, it is necessary to show that such possession was hostile or adverse, that it was actual, visible, notorious and exclusive, and that it was continuous and under claim of ownership; and these matters must be made out by clear and positive proof.

4. SAME—*question of possession depends upon particular circumstances.* The question of possession depends to a great extent upon the character of the land and the particular circumstances.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES B. CAMPBELL, Judge, presiding.

On September 2, 1910, appellant, J. Edward Kinsella, filed a bill in chancery in the circuit court of Kankakee county against appellees, Abe Olds and L. P. Swannell, and others, for the purpose of quieting title in him to certain tracts of land situated in sections 14, 15, 16, 21, 22 and 23, in township 31, in that county. The title to the lands described in the bill of complaint, other than in section 23,

was quieted in appellant by the decree of the court and the determination of the title to that portion of section 23 lying north of the Kankakee river reserved for further decree. Olds and Swannell filed separate answers, in which they denied that appellant had any interest in certain tracts in section 23 claimed by them, and alleged title in themselves, respectively. Olds also filed a cross-bill, asking that a certain quit-claim deed from one Sheridan to appellant purporting to convey the land claimed by him, being that part of the north-east quarter of section 23 north of the Kankakee river, be canceled as a cloud on his title, and praying that the title to the land in question be quieted in him. Appellant answered, denying the allegations of the cross-bill. Replications were filed to the respective answers, and the cause was referred to the master in chancery to take the proofs and report his conclusions both as to the law and facts. The master in his report recommended that the title to that part of the north-west quarter of section 23 east of Poka-Nook-Con creek, and that part of the north-east fractional quarter of section 23 lying north of the Kankakee river, (which last described tract was claimed by Olds,) be quieted in appellant, and that the bill be dismissed as to that part of the north-west quarter of section 23 north of the Kankakee river and west of Poka-Nook-Con creek claimed by Swannell, and that the cross-bill of Olds be dismissed as to the lands claimed by him. Numerous objections were filed by the respective parties to the master's report, which were overruled by the master, which objections, on the coming in of the master's report, were ordered to stand as exceptions in the circuit court. On the hearing of the exceptions to the master's report the court did not rule upon each exception separately, but ordered that all exceptions be sustained in so far as they were not in conflict with the findings in the decree, and that they be overruled in so far as the findings in the decree are not in conflict with the master's report. The decree finds that appellant is not in

possession of the tracts claimed by Olds and Swannell, respectively; that Olds and Swannell are in possession of the respective tracts claimed by them; that Olds is the owner in fee simple, as claimed by him, of that part of the northeast quarter of section 23 lying north of the Kankakee river; that the deed from Sheridan to Kinsella should be canceled as a cloud upon Olds' title, and that as to these tracts appellant's bill be dismissed. From this decree appellant has prosecuted an appeal direct to this court.

Appellant's bill, with its amendments, alleges the jurisdictional facts that at the time of the filing of the bill he was the owner and in the actual, open, adverse and exclusive possession of the lands in question; that on January 28, 1910, he acquired title to the land in question in section 23 and to other lands in section 14 lying north of the Kankakee river, said section 14 being directly north of and adjoining section 23; that the subdivision of lands in sections 14 and 23, owing to the existence of the river, was fractional, and that the grants and conveyances of fractional sections carried the title of the grantee to the thread of the river south of the south line of section 14. The bill sets forth title by a chain of conveyances to the south half of section 14 from the United States to the State of Illinois, from it to the Illinois Central Railroad Company, from the latter company to one Stephenson, by *mesne* conveyances from the latter to one Whitehouse, from Whitehouse to Sheridan, and by quit-claim deed from Sheridan to appellant, of all of section 23 lying north of the present Kankakee river, and possession, under the deed, of the lands described in it, and the actual, open, notorious, adverse and exclusive possession of said lands for twenty years by appellant and his grantors, with possession and payment of taxes thereon since the year 1881, and a further claim by accretion and reliction to the riparian ownership of the fractional lands in section 14 bounded by the river, concluding with the allegation that appellees are making some claim



to the lands in question. The south half of section 14, included in the so-called Sheridan ranch, was conveyed by Sheridan to Kinsella, as were the other tracts in said ranch, by warranty deed, except that part of the north half of section 23 north of the Kankakee river, which was quit-claimed, only.

Olds, in his answer, denied the allegations of the bill, and in his cross-bill alleges that he is the owner in fee simple of all that part of the north-east quarter of section 23 lying north of the Kankakee river; that on or about January 4, 1839, one John Holbrook entered at the land office of the district of Chicago the following described lands of the United States subject to sale and entry, and that the United States by its patent conveyed to said Holbrook the aforesaid lands, being the north-east fractional quarter, the south-east fractional quarter and the north-west fractional quarter of the north-west fractional quarter, and the south-west fractional quarter of section 23, in the said township, containing 260.85 acres; that on November 23, 1839, Holbrook and wife conveyed by warranty deed to Joseph Hunt the lands above described; that on March 5, 1851, said Hunt and wife conveyed by warranty deed to George Olds the north-east fractional quarter, containing 61.16 acres, the south-east fractional quarter of the north-west fractional quarter, containing 32.73 acres, and the east half of the south-west quarter, containing 80 acres, in section 23; that on January 1, 1892, George Olds conveyed to Abe Olds by quit-claim deed the north half of said section 23 which lies north of the Kankakee river, which runs across said half section; that he is now the owner in actual possession, seized in fee simple of said real estate, and that he and his father, George Olds, through whom he obtained title, have since July 27, 1853, been in the actual, open, notorious, visible, peaceable, exclusive and uninterrupted possession and occupation of all that part of the north-east quarter of said section 23 lying north of the Kankakee river; that for

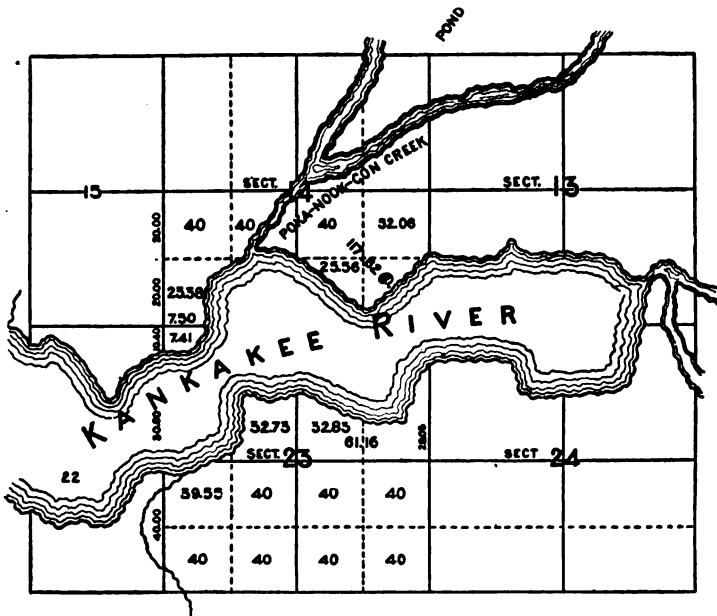
more than twenty years past and upwards, and during all of that time, they have paid all of the taxes levied and assessed upon the same as they became due and payable, and have secured absolute control of said real estate and enclosed the same with a fence, used the timber thereon when desired, and have been recognized by all the neighbors and owners of land adjacent as the owners of said real estate; that he is the owner and in the actual possession of said real estate under a title derived through a regular chain of conveyances from the government of the United States, and claims the benefits of his paper and record title under paragraph 7 of section 7 of the Limitation act of this State; that Millard J. Sheridan and wife had no title or color of title in or to said real estate in fee, possession, remainder, reversion or otherwise, and that the deed from said Sheridan and wife to J. Edward Kinsella of the said lands is a cloud upon his title; that the asserting of the same injures and depreciates the value of his real estate and renders the same less salable and marketable, and prays that the deed from Sheridan and wife to Kinsella of said lands be declared null and void and set aside as a cloud on his title. All of the material allegations of the cross-bill, except the entry by Holbrook and the conveyances as alleged, were denied by appellant in his answer thereto.

Swannell's answer to the bill of appellant, Kinsella, denies the jurisdictional fact of Kinsella's possession and the other material allegations of the bill, and sets up title to the north-west fractional quarter of the north-west fractional quarter of section 23 from the United States to Holbrook, from him to Hunt and from Hunt to Robert Sherman, and that on January 15, 1861, the sheriff conveyed said lands by tax deed to William G. Swannell; that on July 25, 1876, Swannell conveyed said land by warranty deed to Frederick Swannell as containing  $47\frac{1}{4}$  acres; that on February 2, 1882, Frederick Swannell conveyed said land back to William G. Swannell; that Sheridan recog-

nized, acknowledged and admitted the title in William G. Swannell and in his executors and heirs, and that for more than thirty-five years prior to the Kinsella deed Sheridan had acknowledged Swannell as owner of said land, had negotiated with him for the purchase of the same, entered into an agreement with his executor for the care and management of said land, and that Kinsella well knew at the time he received the Sheridan deed that Sheridan did not own it, etc.; that by Sheridan's contract with Kinsella he was not entitled to any portion of said lands in section 23; that Sheridan has never paid any taxes or made any claim to possession or control except as agent of Swannell; that the lands are swamp lands; that no portion could be cultivated or inhabited for residence; that in 1890 Sheridan negotiated with William G. Swannell for leasing said lands and agreed to look after and protect them, and afterwards made a like arrangement with his executor; that the sheriff, on November 13, 1868, by tax deed conveyed to Swannell the north fractional quarter of the north-west fractional quarter of said section 23, and that Swannell for more than seven years prior to the commencement of said suit paid all taxes on the same, and claims the benefit of the Statute of Limitations relating to vacant and unoccupied lands; that Sheridan is barred by *laches*, and that Kinsella had both actual and constructive notice of his claim prior to his purchase.

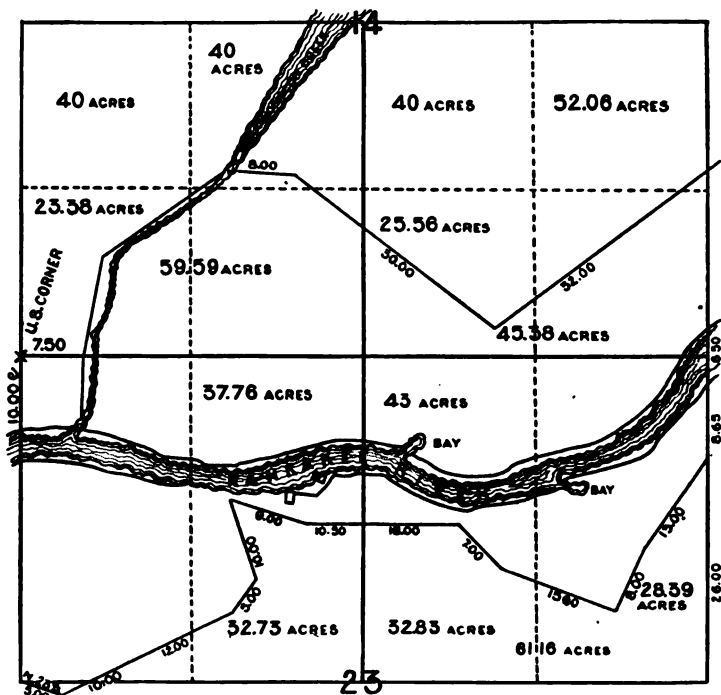
At the time of the government survey a map was made of the township in which the lands are situated and returned to the land office, together with the government field notes made by the surveyors at that time. The map which is in evidence shows that this land at the time of the survey was overflowed and marshy; that the surveyors were unable to go upon the whole of the south part of section 14 or the north part of section 23, and that the Kankakee river at the time spread out over the south part of section 14 and the north part of section 23. They set up the corner stone

of the north-west quarter of section 23 ten chains north of the Kankakee river, and the map shows 7.41 acres of the north-west quarter of section 23 as being north of the river and west of Poka-Nook-Con creek, which empties into the Kankakee river east and south of the south-west corner of section 14. This stream is now about thirty feet in width and separates the 7.41 acres of the north-west quarter of section 23 from the balance of that section north of the Kankakee river. The map of this township as made and returned by the government surveyor at that time, in so far as it relates to these sections, is substantially as follows:



Shortly before this suit was commenced one Schmeltzer, a former county surveyor of Kankakee county, with the aid of the government map and field notes, made a plat of the lands embraced in these sections, showing the meander lines made by the government surveyor substantially coinciding with the river banks on each side as shown on the original government plat, from which it appears that there are

43 acres in the north-east quarter of section 23 north of the Kankakee river and 37.76 acres in the north-west quarter of that section north of the Kankakee river and east of Poka-Nook-Con creek. The plat is as follows:



Appellant claims title by *mesne* conveyances from the Illinois Central Railroad Company to one Anderson, from Anderson to one Johnson, from Johnson to Wilson and Peterson, from the latter to Sheridan, and from Sheridan to him, of the south half of section 14, and insists that since the south-west quarter and the south-east quarter of section 14 are shown by the government survey as fractional quarter sections and are bounded by the Kankakee river, each quarter section extends south to the thread of that stream, which is south of the north line of section 23, and that he is entitled to all that part of section 23 north of the river as a part of section 14 by accretion and the

recession of the water in the Kankakee river. The title of the Illinois Central Railroad Company to the land is based upon a grant by the United States government to the State of Illinois of certain lands for railroad purposes. Pursuant to this grant the State of Illinois incorporated the Illinois Central Railroad Company, and in 1852 granted to said railroad company certain sections of land, including the south-east fractional quarter of section 14, containing 103.45 acres, and the south-west fractional quarter of that section, containing 117.52 acres, which were duly conveyed to the railroad company in the manner provided by law, and which by *mesne* conveyances ultimately became the property of appellant.

The claims of the three parties to this suit are, in brief, as follows: Kinsella claims to be the owner of that portion of the north-east quarter of section 23 north of the Kankakee river, and also that portion of the north-west quarter of said section 23 north of the Kankakee river, (1) through a contract of purchase and deed from Sheridan and his actual possession of said land at the time of filing the bill under the Sheridan deed; (2) on his actual possession and Sheridan's possession under a deed from one Whitehouse to the north-west quarter; (3) on the ground that the grants of the south-east fractional quarter and the south-west fractional quarter of section 14, which lie immediately north of section 23, gave the grantee title to all land to the center of the river and Poka-Nook-Con creek; (4) on the ground of alluvion or accretion and reliction; (5) on adverse possession by Kinsella and his grantors for twenty years; (6) on the Whitehouse deed of 1882 and possession and payment of all taxes legally assessed. Olds' claim to the north-east quarter of section 23 is based on a continuous chain of *mesne* conveyances of record from the United States to himself, possession thereunder and payment of taxes. Swannell's claim of title to the north-west quarter is based on a tax deed and payment of taxes under

claim and color of title for more than seven years and on twenty years' adverse possession. Both Olds and Swannell set up the defense of *laches* and limitation to the bill of complaint of Kinsella. The evidence bearing on these matters will be discussed in the opinion.

MCARDLE & MCARDLE, and J. BERT MILLER, for appellant.

H. K. & H. H. WHEELER, and EDWARD P. HARNEY, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Appellant urges that the court erred in dismissing his bill of complaint for want of equity as to the tracts claimed by appellees, Olds and Swannell, respectively, and in not also dismissing the cross-bill of Olds. It was proper, under the circumstances, to grant relief on the cross-bill of Olds. *Wachter v. Blowney*, 104 Ill. 610; *Houston v. Mad-dux*, 179 id. 377.

The only paper title claimed by Kinsella to any part of the land in controversy is his contract and deed from Sheridan, and a deed from Whitehouse to Sheridan, executed in 1882, conveying the north-west fractional quarter of section 23. There was no deed from anyone to Sheridan of the north-east quarter, and the title of complainant to that quarter must rest upon his adverse possession as alleged, or upon his claim that the original grantees of the south-east quarter and south-west quarter of section 14, the same being fractional quarters as shown by the government survey, took all the land to the thread or current of the Kankakee river, and that the land became his by alluvion and accretion.

A grant of land bordering on a stream, whether navigable or not, carries title to the center thread of the stream unless the boundary is in some other way designated. (*City*

of *Peoria v. Central Nat. Bank*, 224 Ill. 43.) A meander line which is run for the purpose of ascertaining the amount of land in a fractional section cannot be regarded as a boundary line. (*Houck v. Yates*, 82 Ill. 179; *Middleton v. Pritchard*, 3 Scam. 510; *Canal Trustees v. Haven*, 5 Gilm. 548.) These cases, however, were decided on the ground that the river itself was taken as the actual boundary of the land. In *Houck v. Yates*, *supra*, the riparian owner had title to the west fractional half of the north-east quarter and the fractional north-west quarter of section 5, the lines of which running south extended to the center of the then channel of the Mississippi river and included the land in controversy. The court, on page 182, said: "Had any corner or monument been established to mark the southern boundary of appellee's purchase, by the government surveyors, such would have been conclusive. That, however, did not occur, but the river seems to have been left to mark the southern boundaries of the land."

In *Granger v. Swart*, 1 Wol. 90, it was held that if between the meander line by which the government survey was made, and the bank of the river, there is at the time a body of swamp or waste land or flats in which timber and grass grew and horses and cattle fed, then the patents for the land surveyed would not cover this land but be confined to the limits of the meander line and include no more.

In *Lammers v. Nisson*, 4 Neb. 245, it was held that the mere fact that a meander line was run and was designated upon the plat was not conclusive and would not estop the government from disposing of lands left unsurveyed between such line and the bank of the stream; that to do otherwise would prevent the correction of mistakes made by surveyors in such case.

In *Bissell v. Fletcher*, 19 Neb. 726, the court held that where the plat and patent to the plaintiff was to lot 3, containing 52.60 acres, and to run north to the Republican river, he was not entitled to claim lots 6 and 7, containing



about 117 acres, and which, in fact, was land between the river and where the plat showed the bank to be.

Section 10,144 of the Revised Statutes of the United States (Pierce's Code) provides: "The boundary actually run and marked in surveys returned by the surveyor general shall be established as the proper boundary lines of the section or subdivision for which they were intended, and the length of such lines as returned shall be held and considered as the true length thereof, and the boundary line which has not been actually run and marked shall be ascertained by running straight lines from established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary line shall be ascertained by running from the established corners to north and south or east and west lines, as the case may be, to the water-course, Indian boundary line or to the external boundary of such fractional township."

In *Clute v. Fisher*, 65 Mich. 48, it is said: "The land described as a fraction of any subdivision, as, for instance, the south-east fractional quarter, cannot be extended beyond the lines of said subdivision as they would run if extended."

A grantee, by patent, of a legal subdivision of land can not thereby derive title to land upon another legal subdivision. (*Farmers v. Dodge*, 64 Mich. 175; *Wilson v. Hoffman*, 54 id. 246; *Keyser v. Sutherland*, 59 id. 455.) The purchase of a fraction of a quarter section could not give to the purchaser a larger body of land than a grant of the whole would give. *Edwards v. Ogle*, 76 Ind. 307.

In the case of *Sawyer v. Cox*, 63 Ill. 130, this court said: "The object of these surveys is, first, if practicable, to find the original corners established by the surveys made by the authority of the government. It is by those lines and corners the government sold and persons purchased the public land, and when sold, the purchaser, by his patent, ac-

quired title to all of the land embraced within the boundary lines of the tract thus purchased. When the lines and corners established can be found and identified the purchaser acquires title to all the lands embraced within their limits, and it does not matter whether the surveys are accurate, as the boundaries, when found, must control the notes or plat of the survey, hence they govern the calls for course, distance and quantity. The plats and notes of the survey are intended to represent what was done in the field and must yield to the lines and corners when found, but when they have become obliterated and cannot be found and traced by natural or artificial monuments, they can only be re-located by the field notes and plats of the original survey, and in doing so then resort must be had to known lines and monuments as a basis on which to survey and find where the original lines and corners were established by the government surveyors." And in *Fuller v. Shedd*, 161 Ill. 462, this court held that the section lines could not be passed when a lake was so large that the extension of those lines would not absorb it.

In *James v. Howell*, 41 Ohio St. 696, the court refused to extend the meander line across a space designated as an impassable marsh and water so as to include two islands, the computed acres in the grant not including either the marsh, water or island.

In *Shoemaker v. Hatch*, 13 Nev. 261, the court said: "To determine whether a bar or island is part of the land on either side of a stream, account must be taken, in every case, of a variety of circumstances, such as the relative size and permanence of the channels, the size of the island compared with the size of the stream, and the conformity or divergence of course between the main line and the main channel. It is a question of fact to be determined from all the surrounding circumstances whether the land between a meander line and the shore of the lake or water-course is included in the survey."

In *Martin v. Carlin*, 19 Wis. 454, there was a mistake in the original survey and meandering of Rock river, so that there was more land than the survey called for by the field notes. It was held that where there is a mistake in the survey of a fractional lot, so that either the line of a meandered stream or a quarter section line (both of which were called for by the survey as constituting the line) must be abandoned, the quarter section line should be adhered to as the more certain call.

In the case of *Fuller v. Shedd*, *supra*, after citing the foregoing cases, this court, in its opinion by Mr. Justice Phillips, said: "From these cases it would follow the construction of the grant would be: where a narrow strip of land lies between the meander line and the natural boundary, as a stream or river, and its proportions are much smaller than the land granted, it would be included in the grant and the center of the stream or river would be the boundary unless a different intention was manifested by the terms used. Where the land outside the meander line is so grossly in excess of that sold that it is apparent there is fraud or mistake in the survey, the meander line would be the boundary."

In the case at bar, while there is no evidence of either fraud or mistake in the survey of 1834, by which the meander lines were established, the river at its usual stage of water did not form the boundary of the south-west quarter and south-east quarter of section 14, and the meander lines were run as they were because of high water at the time, the Kankakee river having overflowed its banks so that it was impossible to establish the south-east corner of section 14, which would be the north-east corner of section 23. We gather from the evidence in the record that the main channel and banks of the river at the ordinary or low stage of water were in about the same place at the time of the survey of 1834 as they were when the suit was tried, and that between the meander lines as run by the sur-

veyor and the bank of the river were large portions of the south-east quarter of the south-west quarter of section 14, and also the premises in dispute in the north part of the north-east quarter and north-west quarter of section 23. This was heavily timbered in part, with large trees growing thereon, and some pasture when the river subsided within its banks. As we have stated, the south-west corner of section 14 was established and marked and a basis made for running the section line between sections 14 and 23 and so determining the proper boundary lines between those sections. We are therefore of the opinion that the grantee from the government of the south-west quarter and the south-east quarter of section 14, and the subsequent grantees down to Kinsella, took by their deeds the quantity of land as originally surveyed by the government and denoted as fractional, and also took all of the land contained within the boundary of said quarter sections when the same should be established, but they would not thereby take title to any land outside of the said quarters, and would not take any title thereby to any lands in section 23.

Nor do we think that appellant is in a position to claim any title to the lands in question by alluvion and accretion, as being a part of section 14 by reason of the subsidence of the Kankakee river, for the reason that he has estopped himself, both by the allegations of his bill and the deed under which he claims title, from insisting such lands are not a part of section 23. In the deed the land is described as being in section 23, and in the bill filed by him in this cause he has specifically alleged that the lands in question are in section 23, and more particularly in that part of section 23 which is north of the Kankakee river. He is now estopped by these acts from insisting that the land is not in section 23. (*Millard v. Millard*, 221 Ill. 86; *Smith v. Young*, 160 id. 163.) Furthermore, the land between the meander lines and the river was simply the overflow land

from which the high water subsided when the river was at the normal or low stage.

As to the title claimed by appellant by twenty years' possession, to establish such title by limitation by twenty years' possession it was necessary to show, first, that such possession was hostile or adverse; second, actual; third, visible, notorious and exclusive; fourth, continuous; fifth, under claim of ownership; and such elements must be made out by clear and positive proof. (*Clark v. Jackson*, 222 Ill. 13; *McClellan v. Kellogg*, 17 id. 498; *Towle v. Quante*, 246 id. 568.) The question of possession depends to a great extent upon the character of the land and the circumstances. As we have shown, the tracts of land in dispute were overflow lands, covered with water and inaccessible for ordinary use during much of the time, and owing to the character of the land and its uninhabitable condition no very pronounced acts of ownership or possession were possible. The lands comprising the so-called Sheridan ranch appear to have been fenced, and the fences extended along the east and west sides of section 14 south to the Kankakee river, thus enclosing on the east and west sides the lands in dispute. It also appears that the cattle pastured by different tenants on the Sheridan ranch ranged over this land at times, and, as some witnesses testified, when the water was low they would cross the river to the south, and cattle owned by others, pasturing on the south of the river, would cross over to the north onto the lands in dispute. It also appears that certain persons, under permission from Sheridan, the former owner, at different times cut wood upon portions of the land in dispute, but this evidence is not very definite. For many years there was no boundary line established between sections 14 and 23, and it is not shown very clearly whether the wood that was cut and hauled off in the winter time under permission from Sheridan was on section 23 or section 14. George Olds, father of appellee Abe Olds, had the record title to the north-east quarter.

From the time he first obtained title to this land, in 1851, he was in possession of the same, as far as such possession was possible. He cut and sold wood, hewed timber from the land, warned trespassers off the land, and exercised acts of ownership both before and after Sheridan bought the adjoining land, in 1882. After he conveyed the land to his son, Abe Olds, in 1892, the latter had a saw mill there one winter and took wood from it. Soon after he got his deed he had the north line of said north-east quarter of section 23 between that section and the south-east quarter of section 14 surveyed and established, built a wire fence along such line, and afterwards turned his hogs in on said land, warned trespassers off of the said land, and exercised such other acts of ownership over it as were possible in its then condition. Sheridan testified that he cut the fence when he heard that it had been placed there, and there is evidence that wires were cut by hunters and fishermen at times of high water so they could get their boats through. Olds states the fence was cut and washed out at times and he kept it in repair as best he could. He testified that on one occasion he had a conversation with Sheridan, which is not denied, about some poles that had been cut on the river bottom, and Sheridan stated that if they had been cut on Olds' land he would pay for them, and if Olds had cut any on his land he should have to pay for them. He also testified that shortly after he had fenced this land Sheridan tried to buy it from him and made an offer, and he offered to take a larger amount, but they could not agree on the price.

Without discussing all the evidence bearing upon the question of possession, we have given the same such consideration as we think it is entitled to, and on the whole are satisfied that the circuit court did not err in its finding as to the possession and ownership of the land. Such possession as Sheridan had or claimed to have, under the circumstances was not, as shown by the evidence, hostile, exclusive or under claim of ownership.

As to the title to that portion of the north-west quarter of section 23 north of the Kankakee river claimed, respectively, by Kinsella and Swannell, Sheridan, the grantor of Kinsella, did obtain a deed from Whitehouse to said land. No title, however, is shown in Whitehouse and no reason or authority for such conveyance is given. He was a stranger to the title and such deed is not explained. William G. Swannell secured a deed for 7.41 acres of the same in 1861, the land being sold for taxes for the year 1858. Thereafter Swannell paid taxes on the land for several years as containing 47.25 acres. In 1876 the lands were again sold for delinquent taxes levied upon the tract as the north fractional north-west quarter of section 23, Swannell becoming the purchaser at such tax sale. On February 2, 1882, Swannell and wife conveyed the land to Frederick Swannell as containing 47.25 acres, and thereafter, from 1882 to 1890, inclusive, and ever since that time, the taxes have been paid by the Swannells on 47.25 acres. It further appears that on February 16, 1890, M. J. Sheridan, the then owner of section 14, had some correspondence with William G. Swannell relating to the renting of Swannell's land in section 23, and in replying to a letter of Swannell Sheridan says: "Yours referring to the leasing of your land in section 23 received some time ago. Replying will say that your land is all swamp timber and could not be of any use to me. Before I bought my land the timber was all cut off yours, but since I have kept people off of it, as they would cut over on mine if I allowed them to cut near there. There is now a very nice growth of young timber coming, which will be worth something in a few years if protected. The last year was the first in which anyone could get onto your timber during the summer since I bought my land, in '80 or '82." There is also evidence to the effect that on several occasions there were negotiations between Sheridan and Swannell, and after Swannell's death with his executor, relating to the purchase of this land, and from a

survey of all of the facts and circumstances we do not feel disposed to hold the court's conclusion that the weight of the evidence shows that Sheridan had recognized both Olds and Swannell as being the owners of the property which is now in dispute was erroneous.

In Sheridan's contract with Kinsella, made in 1909, it was shown that he agreed to sell and convey 1200 acres of land, more or less, in sections 14, 15, 16, 21 and 22, and quit-claim any land in section 23 now standing in his name of record, guaranteeing a merchantable title to at least 1200 acres. It appears that subsequently, under this agreement, a survey was made of the Sheridan lands, and, outside of any land in section 23 claimed by either Olds or Swannell, Kinsella acquired the title to 1260 acres. After the commencement of the suit Sheridan stated to the executor of the Swannell estate that he did not want Swannell to think that he was deeding property upon which he had no claim or title or was trying to steal it; that he had made a contract with Kinsella to convey him certain land but had not intended to sell section 23; that he told Kinsella he had no claim whatever to the Swannell land; that it belonged to the W. G. Swannell estate, and that he still knew that to be the case. The fact that his cattle and his tenant's cattle were allowed to roam over the land whenever it was dry enough, or that he allowed wood to be cut and sold therefrom near the dividing line, would not support a claim of ownership or possession, as it appears he had never leased or attempted to exercise any acts of ownership or possession over lands outside of section 14. Under the circumstances we think the court properly decreed that appellant had no interest in the Swannell tract.

We find no error in the decree sufficient to warrant a reversal, and the decree of the circuit court will be affirmed.

*Decree affirmed.*



HENRY HERSCHBACH *et al.* Appellants, *vs.* THE KASKASKIA ISLAND SANITARY AND LEVEE DISTRICT *et al.* Appellees.

*Opinion filed October 16, 1914—Rehearing denied Dec. 4, 1914.*

1. EQUITY—*when court of equity has jurisdiction of bill to enjoin collection of drainage assessment.* A court of equity has jurisdiction of a bill which seeks not only to restrain the collection of an alleged void drainage assessment but also to enjoin the expenditure of money already collected, the levy of other threatened assessments and the issue and sale of bonds based thereon, as the remedy at law by objecting to the assessment on application for judgment and order of sale is inadequate and a multiplicity of suits will be prevented.

2. CONSTITUTIONAL LAW—*whether a general act is applicable to a given situation is a legislative question.* The fact that the legislature has passed a special act is a legislative determination that a general law cannot be made applicable to the situation, and if the subject of the act is not one upon which special legislation is specifically prohibited by the constitution, the question whether a general act could have been made applicable is not open for judicial determination.

3. SAME—*the legislature cannot authorize a levy of special assessment for other than corporate purposes.* The legislature can authorize special assessments by the corporate authorities of a drainage district for corporate purposes only, and is without power to authorize an assessment for attorneys' fees for services rendered before the district was in existence and for the expenses of committees in connection with the passage through the legislature of the special act creating the district.

4. SAME—*term "corporate authorities," as used in constitution, explained.* The term "corporate authorities," as used in section 31 of article 4 of the constitution, authorizing the legislature to pass laws for the organization of drainage districts and the levy of special assessments by the corporate authorities thereof, means those municipal officers who are either directly elected by the people of the municipality or appointed in some mode to which they have given their assent. (*Owners of Lands v. People*, 113 Ill. 296, distinguished.)

5. SAME—*act of 1913, incorporating Kaskaskia Island Sanitary and Levee District, is unconstitutional.* The provision of the special act of 1913 incorporating the Kaskaskia Island Sanitary and Levee District, (Laws of 1913, p. 278,) which authorizes the ap-

pointment of the commissioners by the circuit court of Randolph county without any provision for a referendum vote by the people to express their assent to such appointment, renders the entire act unconstitutional and void, for the reason that the commissioners so appointed are not "corporate authorities."

6. SAME—*what does not amount to assent by people to method of appointing commissioners.* The fact that the preamble of a special act incorporating a drainage district recites that the legislature has been petitioned to pass an act does not authorize a holding that the people have assented to the method provided in the act for the appointment of commissioners by the circuit court.

APPEAL from the Circuit Court of Randolph county;  
the Hon. GEORGE A. CROW, Judge, presiding.

R. E. SPRIGG, and J. FRED GILSTER, for appellants.

EMERY ANDREWS, RAYMOND G. REAL, and ARTHUR E. CRISLER, for appellees.

MR. JUSTICE VICKERS delivered the opinion of the court:

The complainants below, who are land owners and taxpayers of the Kaskaskia Island Sanitary and Levee District, filed a bill in the circuit court of Randolph county against said sanitary district, and the commissioners thereof, for the purpose of enjoining the said commissioners and other officers of said district from proceeding to collect an assessment levied upon the lands of the district under ordinance No. 1, and from making any additional assessments, or issuing or selling bonds in anticipation of any assessment, or from using and expending any money realized from said assessment already levied. Said sanitary district was organized under a special act which became operative July 1, 1913, (Laws of 1913, p. 278,) incorporating the Kaskaskia Island Sanitary and Levee District. The principal ground upon which the bill is based is the alleged unconstitutionality of the act under which the district was organized. The defendants below filed a general demurrer

to the bill, which was sustained, and complainants having elected to stand by the bill it was dismissed, and from the final decree dismissing the bill complainants have prosecuted this appeal.

The particular assessment the collection of which is sought to be enjoined was levied under an ordinance passed by the commissioners on August 25, 1913. After reciting the passage of the act incorporating the district, and some of its provisions, and the necessity for a preliminary assessment to pay for survey, maps, plans and profiles of the lands of said island and all accretions thereto, the ordinance levies an assessment of \$5171.77 on all of the lands of the district for the purpose of paying the expenses of "legislation, organization of the commissioners and the preliminary survey, maps, plans, profiles and estimates necessary to be made to ascertain the nature, kind, character and the extent of improvements which can or ought to be made by said commissioners, and to pay any and all other necessary and incidental preliminary expenses necessary to carry out the object and purposes of the act." The ordinance provides that the commissioners shall proceed to make out an assessment roll and to distribute said assessment upon the lands, lots, pieces and parcels of land of said district as they may determine the benefits which may be derived by said lands from the said preliminary work aforesaid, and that said assessment roll be certified to as a fair and just distribution of the assessment upon the several parcels of land in said district according to the benefits received by each parcel from the preliminary work aforesaid. The ordinance further provides that the assessment shall be designated as assessment No. 1, and that it shall be payable in one installment to become due on January 2, 1914, and that said assessment shall be paid on or before March 10, 1914, or be returned as delinquent and collected in the same manner as other general taxes. The bill alleges that the commissioners will proceed to

spread additional assessments on the lands of said district and will issue bonds to the amount of \$175,000 predicated upon said assessments, and that said bonds will be sold unless appellees are restrained from so doing.

Appellants contend that the whole act under which said district is incorporated is unconstitutional and void, and that in no event and under no circumstances can a valid levy be made under its provisions. It is contended that the act is void as being obnoxious to section 22 of article 4 of the constitution of 1870, which prohibits special local legislation; and further, that the act is in contravention of sections 9 and 10 of article 9 of our State constitution; also that it is in contravention of section 31 of article 4 and section 2 of article 2 of the constitution. Appellants make a special objection to the levy for preliminary work, claiming that such assessment is void because, it is said, it is not based upon benefits accruing to the lands of the district, but that it is for preliminary work which may or may not result in any benefit, and for the payment of expenses of legislation which, it is argued, are contrary to public policy and in no event could be a proper charge against the drainage district.

Before proceeding to a consideration of the merits of this controversy, the appellees insist that the decree below should be affirmed for the want of jurisdiction in a court of equity to entertain the bill. In support of this contention it is urged that appellants have a complete and adequate remedy at law, since all of the objections here relied upon could be raised on an application for judgment for delinquent taxes. It is, of course, always a sufficient objection to the jurisdiction of equity that there is a complete and adequate remedy at law, (*Bodman v. Drainage District*, 132 Ill. 439,) and this rule is applicable to a bill to enjoin the collection of a tax; (*Ayers v. Widmayer*, 188 Ill. 121; *Correll v. Smith*, 221 id. 149;) but where the bill seeks not only to restrain the collection of a void

tax but also to enjoin other threatened levies, the expenditure of money already collected or the sale of bonds issued without authority of law, then equity will take jurisdiction to restrain such acts on the ground that the remedy at law is inadequate and to prevent a multiplicity of suits. (*Darling v. Gunn*, 50 Ill. 424; *Wilson v. Sanitary District*, 133 id. 443; *Chicago and Milwaukee Electric Railway Co. v. Vollman*, 213 id. 609.) The bill in the case at bar charges that the commissioners are threatening to levy other assessments upon the real estate of the district and to issue bonds in anticipation of such assessments and to sell the same, and that they will do so unless restrained by injunction. These allegations, in connection with those in respect to the unconstitutionality of the act under the authority of which all the acts sought to be enjoined have been or will be committed, under the decisions of this court state a case bringing the subject matter within the jurisdiction of a court of equity.

The act of the legislature creating this sanitary district is both special and local, and appellants insist that for this reason the act is unconstitutional, as being in violation of section 22 of article 4. It is said that one of the two drainage laws now in force might have been resorted to for the purpose of organizing Kaskaskia island into a district, or if neither of said general acts was applicable, that some other general law might have been passed, and if a general act could be passed which would be applicable to the situation, then a special act is prohibited by that clause of section 22 of article 4 which provides that no special act shall be passed in a case where a general law can be made applicable. Whether a general act of the legislature is applicable to a given situation is a question for the legislature to determine, and its determination of that question is not reviewable by the courts. Section 22 of article 4 of the constitution prohibits special legislation in respect to certain specified subjects, and contains the general language

above referred to which prohibits special legislation in all other cases where a general law can be made applicable. The fact that the legislature has passed a special act is a legislative determination that a general law could not be made applicable, and since the subject of the act is not one upon which special legislation is specifically prohibited by the constitution, the question whether a general act could be made applicable is not open for judicial determination. *Wilson v. Sanitary District*, *supra*.

Before considering any of the other objections urged to the validity of this act it will be necessary to state briefly some of the principal provisions of the act itself.

The act is preceded by a preamble, which recites that "whereas a majority of the legal voters of the island of Kaskaskia and a majority of the land owners owning the major portion of the land upon said island, have petitioned the General Assembly of Illinois to organize for them a sanitary and levee district comprising the lands of said island," and recites the necessity for such act for the adequate drainage and the protection of the health of the inhabitants of the said island, which said preamble is then followed by the body of the act. Section 1 creates the corporation under the name of "The Kaskaskia Island Sanitary and Levee District," and provides that by that name it shall be a public corporate body, with power to sue and be sued, conduct the business of said corporation, have perpetual existence and perform and execute all the powers conferred upon it by this act or incident thereto, and that it may have a common seal and change the same at its pleasure. Section 2 declares the object and purpose of creating said corporation to be the drainage of the lands of said island by artificial drains, canals, ditches, levees and other drainage facilities and to provide ways and means necessary to carry out and accomplish said objects and purposes, and thereby to benefit and make more valuable the land of said island and to preserve and promote the health

of the residents thereof; and it is further provided in said section that in order to accomplish these purposes said act shall be liberally construed, and as an exercise by the legislature of all power appertaining to it for the benefit and protection of the lands on said island and the lives and health of the residents thereof. Section 3 relates to the manner of appointing commissioners, and provides that the business of said corporation shall be conducted by three commissioners, who shall be resident land owners residing upon said island and who shall be appointed by the circuit court of Randolph county in term time, or by the judge thereof in vacation, by an order signed by the presiding judge of said court, or if in vacation by the judge thereof who presided at the preceding term thereof, and filed with the clerk thereof and duly entered of record; that the said commissioners shall be appointed upon the passage of the act, one to serve for one year, one for two years and one for three years, each to serve until his successor is duly appointed and qualified, as provided by the act, the successor to each to be appointed for a term of three years. Said section also provides that any of said commissioners may be removed for cause by the court at any time, the subsequent appointments to be made on the first day of July of each year. By section 4 it is provided that the commissioners shall meet and organize by selecting one of their number president of the board, another secretary, and by choosing a clerk and a treasurer who shall not be members of said board. Section 5 provides for the term of office of the treasurer and his qualifications, etc., and section 6 provides for the bond of the treasurer. Section 7 defines the duties of the president, and section 8 the duties of the clerk. Section 9 prescribes a compensation of four dollars a day for each of the commissioners for each day actually put in, in and about the performance of the duties imposed upon them by said act. Section 10 defines the corporate powers of said district, and authorizes the commis-

sioners to build levees, construct all necessary ditches and drains, erect pumping stations as they may deem necessary, build roads and bridges and maintain and operate the same, and make any other necessary improvements upon said island for the purpose of protecting the health of the inhabitants of said island, and all the lands thereof from wash and overflow, and provides that in order to raise money for said improvements the said district is authorized to levy special assessments upon the property benefited, including all public highways and public property upon said island benefited thereby, and authorizes said corporation to accept and receive any appropriations either from the State or national government, or voluntary donations and subscriptions from any other source, etc., for the purpose of making said improvements or for the performance of the duties imposed by the act. Section 11 authorizes the corporation to employ all engineers, attorneys, clerks and labor necessary to enable it to fully and faithfully carry out the duties imposed by the act and to make and enter into contracts for that purpose. Section 12 is as follows:

"Sec. 12. *Expense of organization.*—Said commissioners shall first pay out of any funds received by them other than by special assessment the preliminary expenses of employing attorneys, and the necessary expenses of committees and any and all other necessary expenses in procuring the passage of this act, and all other legislation necessary to attain the objects and purposes contemplated by this act, including any expenses and attorney's fees necessarily expended in and about any legislation concerning the management or control of the Kaskaskia commons permanent school funds, whereby this corporation may be benefited, and if no other funds are available for such purposes then the same may be included in any special assessment made for the improvements made upon said island by said district, as a part of the expenses thereof, or for the engineering and all other preliminary expenses provided for in this section for



any improvement they may contemplate, make a preliminary assessment on the lands, lots or parcels of lands proposed to be included in any improvement made by them for the purpose of paying and defraying said expenses, which shall be made in the same manner as the assessment made for the work, except that it need not be confirmed by the circuit court of Randolph county, but shall be made by a proper ordinance passed by the said commissioners and entered upon their record, and the finding of the said commissioners of the necessity of said assessment shall be conclusive, which said assessment shall be payable on or before January 2, after it is made and shall be collected by the clerk of the board and turned over to the treasurer of the board, and any unpaid portion thereof shall be returned delinquent to the county treasurer of Randolph county by March 10, after the same becomes due, and collected in the same manner as other general taxes."

The subsequent sections of the act provide for the carrying out of the purposes of the act and give detailed directions therefor. It will not be necessary to set out those sections in order to determine the questions that are controlling upon this record.

Appellants contend that section 12 of the act in question is unconstitutional because it authorizes an assessment not based upon the benefits received by the lands of the district and that it authorizes the levy of taxes for purposes other than corporate purposes. Preliminary surveys, making of maps, and other engineering work which is necessary to enable a municipal corporation to determine the character and extent of improvements to be made, if made by the corporate authorities after the municipality is duly organized, may be regarded as corporate purposes within the meaning of the constitution, and if such work results in a benefit to the lands of the municipality it may properly be included in a special assessment levied to pay for the improvement where the aggregate amount of the expenses

does not exceed the aggregate amount of benefits conferred. But section 12 of this act authorizes a levy of taxes for expenses incurred prior to the time the district had any existence. Those expenses were not incurred by the corporate authorities of the district nor can they be said to have been made for a corporate purpose. Such items as expenses of committees in connection with the passage of the act through the legislature, and attorney fees for services rendered before the district was incorporated, cannot be held to be such expenses as the legislature may authorize a special assessment to meet. The legislature can only authorize special assessments for corporate purposes by the proper authorities of a drainage district. The ordinance passed under which the present assessment was levied shows that the levy was made for the purpose of meeting expenses incurred before the district was incorporated, and such expenditures must be held to be illegal, as not being within the constitutional power of the legislature to authorize.

But there is still another very serious objection to the assessment here sought to be enjoined. Section 31 of article 4 of the constitution provides that the General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provides for the organization of drainage districts, and vests the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby. It will be noted that the power of the legislature to authorize special assessments for benefits received is limited to the "corporate authorities" of the drainage districts that are organized under legislative authority. We have already pointed out that the drainage commissioners of the appellee district were to be appointed by the circuit court or the circuit judge of Randolph county. Are com-

missioners thus appointed the "corporate authorities" of the municipality within the meaning of this clause of the constitution? By "corporate authorities," as used in this clause of the constitution, must be understood those municipal officers who are either directly elected by the people of the municipality or appointed in some mode to which they have given their assent. (*Lovington v. Wider*, 53 Ill. 302; *Cornell v. People*, 107 id. 372; *Wetherell v. Devine*, 116 id. 631; *Givins v. City of Chicago*, 188 id. 348.) The act of the legislature under which this district was organized contains no referendum clause, nor is there any other provision or means provided therein giving the tax-payers of the district an opportunity to express their assent to its provisions. After the adoption of the first amendment to the constitution of 1870 relative to the organization of drainage districts, this court held, under general drainage acts passed subsequently thereto, that persons other than those elected by the people of the district or appointed in some method to which the land owners had given their assent constituted the legal corporate authorities of such districts. Thus, in *Owners of Lands v. People*, 113 Ill. 296, it was held that the act of 1879, which made the county commissioners of counties not under township organization the drainage commissioners of all the drainage districts of the county, was a valid law, but in this and other cases it was pointed out that these districts were organized by the voluntary act of the majority of the land owners in petitioning for the organization, and in this respect those cases are distinguishable from cases decided under special acts of the legislature which organize a given territory into a drainage district and provide for the appointment or election of the officers of such district in some way to which the people have not assented. In *Lovington v. Wider*, *supra*, *Cornell v. People*, *supra*, *Wetherell v. Devine*, *supra*, and in other cases, this court had defined the corporate authorities of municipal corporations as being the persons

elected in the municipality or appointed in some way to which the voters had given their assent. When the amendment of 1878 was adopted to the constitution and employed the term "corporate authorities," it must be assumed that those words were employed with the meaning that had been given thereto by the decisions of this court. The cases under the general Drainage law, where districts were organized upon the voluntary action of the land owners, are not controlling here, since this act was local and special and organized the territory into a drainage district without any act on the part of the property owners and subjects their property to burdens of taxes to be imposed by persons who have not been elected by the people of the district or appointed under any law to which they have given their assent. It is said that a majority of the land owners of this island petitioned the legislature to pass the act in question, and that the signing of such petition was a manifestation of assent within the requirements of the constitution. We cannot so hold. The recital in the preamble of this act only shows that the legislature had been petitioned to pass an act incorporating the island into a sanitary district. Accepting the recital of the legislature as conclusive of the fact that a petition was filed, it cannot be construed as a petition for the passage of an act which would deprive the people of the island of their constitutional rights. We would not be warranted in so holding unless the language of the preamble were so clear as to admit of no other construction. The commissioners of this district not having been elected by the people of the municipality nor appointed in any way to which they have given their assent cannot be held to be the corporate authorities of the said district.

In the case of *Cornell v. People*, *supra*, this court had occasion to determine whether a South Park commissioner appointed by the Governor under an amendatory act of the legislature was a legally appointed officer of the corpora-

tion. The original act incorporating the South Park district provided that the commissioners should be appointed by the Governor and that all vacancies should be filled by appointment "of the judge of the circuit court of Cook county." This act was upheld as valid on the ground that it had been adopted under a referendum vote by the people of the district. Subsequently, in 1881, the legislature passed an act taking the power of appointing the commissioners away from the judges of the circuit court and providing that the Governor of the State should appoint all park commissioners. This amendatory act did not contain a referendum and its provisions had never been assented to by the people. This court held that the appointment of all park commissioners by the Governor was illegal and that commissioners thus appointed did not constitute the corporate authorities of the park district. The reasoning of this court in that case is conclusive of the question now under consideration in the case at bar. The persons who levied the assessment and who are threatening to levy other assessments and issue bonds are not the corporate authorities of this district and their acts as such are illegal and void. The result of this holding is to render the entire act unconstitutional and void. The act cannot stand with those sections relating to the appointment and powers and duties of the commissioners eliminated.

The judgment of the circuit court of Randolph county sustaining the demurrer and dismissing the bill is reversed and the cause remanded, with directions to the circuit court to overrule the demurrer.

*Reversed and remanded, with directions.*

WILLIAM H. LOEHDE, Appellee, vs. JACOB GLOS, Appellant.

*Opinion filed October 16, 1914—Rehearing denied Dec. 8, 1914.*

1. EVIDENCE—*partnership signature not presumed to have been written after partnership ceased.* Where the signature to the certificate to an abstract of title is proved to be in the handwriting of one member of the firm it is not necessary to prove that the signature was attached before the partnership ceased to exist, as it will not be presumed that the partner signed the firm name when there was no firm.

2. SAME—*when objection must point out alleged unintelligible matter in abstract of title.* An objection that an abstract of title contains matter, in the form of isolated letters, figures and words, which makes the document unintelligible "except in certain parts thereof," is properly overruled where no attempt is made to point out the unintelligible portions so their meaning can be explained.

3. CONSTITUTIONAL LAW—*meaning of provision requiring use of English language in judicial proceedings.* The constitutional provision that judicial proceedings shall be preserved and published in no other than the English language refers to the preservation and publication of the record history of a cause, while the provision that such proceedings shall be conducted in the English language does not mean that the oral testimony, depositions and documentary evidence shall be in the English language, but only that their meaning shall be explained in the English language to the court and jury.

APPEAL from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding.

JOHN R. O'CONNOR, for appellant.

WINTERS, PRICE & STEVENS, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The appellee, William H. Loehde, filed his application in the circuit court of Cook county on October 2, 1913, to register his title in fee simple to lot 24, in block 3, in Ashland addition to Ravenswood. The appellant, Jacob Glos, was one of the defendants under an allegation that he was

the holder of a tax deed which was void. The application was referred to an examiner of titles, who heard the evidence and reported that the appellee was the owner in fee simple of the premises at the date of filing his application, and that appellant was entitled to be re-paid the sums of money expended by him in procuring his tax deed and in payment of general taxes and a special assessment. The court overruled exceptions to the report and ordered the title of appellee registered, upon condition that he pay to appellant, or to the clerk of the court for his use, \$835.59 and \$5 costs. The money was paid to the clerk of the court for the use of the appellant, who appealed from the decree.

The evidence of title consisted of a certified copy of an abstract made by Haddock, Vallette & Rickcords and an abstract made by the recorder of deeds of Cook county. The certified copy was objected to on the ground that there was no proof that the signature to the certificate was genuine, and the abstract of the recorder was objected to as not being intelligible on account of abbreviations and arbitrary signs not in the English language. The abstract made by Haddock, Vallette & Rickcords purported to show the condition of the title up to the time it was made, and it was dated "Chicago, December twenty-third (23d), 1890," and under this was the firm name. It was followed by a certificate that it was a true copy of the original examinations of title, which was signed with the firm name but not dated. A witness who had been in the real estate business in Chicago since 1871 testified that he knew the firm of Haddock, Vallette & Rickcords; that their business was the making of abstracts of title to property in Cook county for others for hire; that they were in that business in 1890, at the date of the abstract; that he knew the firm signature appended to the certificate and that it was written by Mr. Rickcords, who was a member of the firm and who was accustomed and authorized to sign the firm name to ab-

tracts made in the ordinary course of business. The firm was dissolved and ceased to exist at some time after the date mentioned, and the objection urged by the appellant is, that the witness did not know the exact date when the signature was appended to the certificate and that it might have been made after the dissolution of the partnership. The signature to the certificate was proved to be in the handwriting of Mr. Rickcords, a member of the firm, and it will not be presumed that he signed the firm name when there was no firm and after it had ceased to exist. While not conclusive, the presumption would be that the firm was in existence. The objection was without force.

The abstract made by the recorder of deeds contained numerous letters which were neither English words nor abbreviations of such words commonly used in the English language. They would, perhaps, be understood by persons engaged in the abstract business as having some meaning in the English language, but their meaning could not be ascertained without some knowledge other than knowledge of the English language. Here is a sample of such letters in a description of a note secured by a trust deed: "with int at 7 p c p a p s a." The objection to this abstract is based on section 18 of the schedule of the constitution, which is as follows: "All laws of the State of Illinois, and all official writings, and the executive, legislative and judicial proceedings, shall be conducted, preserved and published in no other than the English language."

In its broadest sense the term "judicial proceedings" embraces all proceedings in a court of justice, but such proceedings are not all preserved or published. The record history of a cause is alone preserved, and the constitutional provision that it shall be preserved in no other than the English language refers only to such record. That record is for the information of citizens and litigants, and the constitutional provision requires that it shall be so preserved and published that it will be intelligible to a person under-



standing the English language, without other knowledge. (*Stein v. Meyers*, 253 Ill. 199.) The individual need not seek the aid of experts or persons skilled in any art or profession for the purpose of understanding the meaning of the record, but the constitution contemplates that it shall be so preserved that it may be understood without such aid. It is not so, however, with the provision that judicial proceedings must be conducted in no other than the English language, which from the very necessity of the case must often include words and instruments in foreign languages. If it were not so, the provision that every person ought to find a certain remedy in the laws for all injuries and wrongs would have no meaning as applied to numerous injuries and wrongs. Here becomes manifest the misconception of counsel in seeking to have applied to all judicial proceedings the same rule applicable to the record proper. The constitution recognized an existing system of laws and judicial proceedings by providing that the right of trial by jury should remain inviolate and the privilege of the writ of *habeas corpus* should not be suspended unless under certain circumstances. The system of laws and judicial proceedings had always permitted the admission in evidence of testimony or depositions or instruments in a foreign language. Instruments in a foreign language may be the very foundation and basis of rights, and such instruments are always admitted in evidence in the courts, with testimony explanatory of their proper meaning in English. (2 Phillips on Evidence, [Cowen, Hill & Edw. notes,] 709-733; 1 Greenleaf on Evidence,—14th ed.—sec. 280.) Actions may be brought for libel or slander published or uttered in a foreign language, and the words of the foreign language are evidence to sustain the action and obtain redress for the injury. In *Schmisseur v. Kreilich*, 92 Ill. 347, which was an action on the case for slander, the words were spoken in the French language and were so laid in the declaration, with a translation of their meaning into the English lan-

guage. On the trial there was evidence of the speaking of the words in French and the translation of their meaning in English, but the right of the plaintiff to recover rested upon the words spoken in French. If a contract or other document be in a foreign language, it, and it only, is the instrument of evidence and must be produced, proved and offered in evidence, but its meaning must be explained and must reach the court or jury in the English language. A witness who does not understand English can only testify in court in the language which he understands, and it would be contrary to reason to say that the constitution is violated in such a case because the evidence as it comes from the mouth of the witness is not English. The same rule applies in the case of depositions which must be interpreted to the court or jury. (*Cavasar v. Gonzales*, 33 Tex. 133; *Kuhtman v. Brown*, 4 Rich. 479.) Plats, drawings, casts, maps and photographs, none of which can be said to be in the English language and which require explanation in that language, have always been admitted in evidence; and the same is true of real objects or things which are material to a controversy, although testimony may be required to enable the jury to understand and apply such evidence to the issues in the case. The abstract was not excluded by the constitutional provision, and the letters, abbreviations or symbols might have been explained so that their meaning would be clear to the examiner and the court. This was not done, and if the objection made was sufficient it should have been sustained. The objection was that the abstract contained matter in the shape of isolated letters and figures and words, standing alone, which made the document unintelligible "except in certain parts thereof." Some of the isolated letters, figures and words were not intelligible, but an objection to them could have been obviated by evidence explanatory of their meaning. The objection being that the document was unintelligible except in certain parts thereof, those portions which were not intelligible should have been

pointed out, so that the objection might have been obviated by testimony. It is true that if a witness had spoken in the terms used in the abstract by reciting a series of letters and abbreviations his testimony would have been unintelligible, but the objection conceded that portions of the abstract were intelligible without designating what portions were objected to. The court did not err in disregarding the objection as made.

The decree is affirmed.

*Decree affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, *vs.*  
JOHN N. LARSEN *et al.* Appellees.

*Opinion filed October 16, 1914—Rehearing denied Dec. 3, 1914.*

1. APPEALS AND ERRORS—*bill of exceptions is not necessary to a review of errors in the record proper.* The purpose of a bill of exceptions is to enable a party to have a review of matters which would otherwise not be of record, but no bill of exceptions is necessary or proper for the purpose of a review of errors assigned upon the record proper, and such errors may be considered notwithstanding the party does not avail himself of the privilege of filing a bill of exceptions.

2. QUO WARRANTO—*when corporation is not a proper party defendant.* Where a *quo warranto* proceeding is against an existing corporation for a misuse of its franchise or an usurpation of powers not conferred the information should be against the corporation, and if it appears and pleads in its corporate character its corporate existence cannot afterward be controverted; but where the purpose of the proceeding is to challenge the existence of a corporation by calling upon individuals to show by what right they claim to hold and exercise the franchise of a corporation the corporation itself is not a proper party.

3. SAME—*People have right to inquire into title by which corporate franchise is claimed.* A corporate franchise proceeds from the sovereign power, and the People have the right at all times to inquire into the title by which such a franchise is claimed or exercised and to a judgment of ouster if the franchise was improperly granted, and the statute expressly authorizes the Attorney General or State's attorney of the proper county to prosecute, by leave of

court, an information in the nature of *quo warranto* to try the right to the franchise claimed.

4. SAME—*prosecution by information in quo warranto is within section 33 of article 6 of the constitution.* A prosecution by information in the nature of *quo warranto* is within section 33 of article 6 of the constitution, requiring all prosecutions to be carried on "in the name and by the authority of the People of the State of Illinois" and to conclude "against the peace and dignity of the same," but there may be a compliance with such provision though the words are not in the precise form contained in the constitution.

5. CORPORATIONS—*payment of one-half of the capital stock is a condition precedent to lawful organization.* The provision of the statute authorizing the Secretary of State to issue a certificate of complete organization upon the filing of a sworn report of the commissioners that at least one-half the capital stock has been paid in, contemplates that such report shall be true and that the payment of one-half the capital stock shall be a condition precedent to the lawful organization of the corporation, and if such report is false in that respect the People may in a direct proceeding successfully attack the corporate existence of the supposed corporation. (*Foster v. Hip Lung Ying Kee & Co.* 243 Ill. 163, distinguished.)

APPEAL from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding.

MACLAY HOYNE, State's Attorney, (ROSENTHAL & KURZ, and FRANCIS J. HOULIHAN, of counsel,) for the People.

OTTO G. RYDEN, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The State's attorney of Cook county, by leave of the circuit court, filed an information in the nature of *quo warranto* against the appellees, calling upon them to answer to the People by what warrant they claimed to hold and execute the franchise of an alleged corporation known as the Purer Ice and Ice Cream Company. After the motion of the defendants to vacate the order giving leave to

file the information had been denied, one of the appellees filed a general demurrer and the others filed a demurrer which was both general and special. The court sustained the demurrers and dismissed the information, and an appeal was allowed to the People.

The order allowing the appeal provided that a bill of exceptions might be filed by the appellant within a given time, but the privilege was not availed of. It is therefore insisted that this court has no jurisdiction to hear and determine the errors assigned, because the appellant did not comply with the terms of the order. A party to a suit may allege exceptions to rulings of the court upon a trial, and for the purpose of making such rulings, and the exceptions thereto, matter of record may tender a bill of exceptions and have it settled, signed and filed, but he need not do so if he does not desire to have the rulings reviewed on appeal or writ of error. The purpose of a bill of exceptions is to enable a party to have a review of matters which would not otherwise be of record, but no bill of exceptions is proper or necessary for the purpose of assigning error upon the record proper. Such errors have been assigned in this case, and the court has jurisdiction to hear and determine them.

It is suggested that the corporation should have been made a defendant, but this is not a proceeding to forfeit the charter of an existing corporation for abuse of its corporate franchise or to restrain it from an unlawful exercise of its franchise. Its purpose is to challenge the existence of the alleged corporation by calling upon individuals to show by what right they claim to hold and exercise the franchise of a corporation. Where the proceeding is against an existing corporation for a misuse of its franchise or a usurpation of powers not conferred the information should be against the corporation, and if it appears and pleads in its corporate character its corporate existence cannot afterward be controverted. As the legal

existence of a corporation was disputed by the information, it would not have been proper to make the Purer Ice and Ice Cream Company a defendant. *People v. City of Spring Valley*, 129 Ill. 169; *People v. City of Peoria*, 166 id. 517; *People v. Central Union Telephone Co.* 192 id. 307; *People v. Anderson*, 239 id. 266.

A corporate franchise proceeds from the sovereign power, and the People have the right at all times to inquire into the title by which such a franchise is claimed or exercised and to have a judgment of ouster if the franchise was improperly granted, and the statute expressly authorizes the Attorney General or State's attorney of the proper county to prosecute; by leave of court, an information in the nature of *quo warranto* to try the right to the franchise claimed. An information in the nature of *quo warranto* is a prosecution, and section 33 of article 6 of the constitution provides that all prosecutions shall be carried on "in the name and by the authority of the People of the State of Illinois," and conclude, "against the peace and dignity of the same." A prosecution by information in the nature of *quo warranto* is included in that provision. (*Donnelly v. People*, 11 Ill. 552; *People v. Mississippi and Atlantic Railroad Co.* 13 id. 66; *Wight v. People*, 15 id. 417; *Hay v. People*, 59 id. 94; *People v. Gartenstein*, 248 id. 546.) It is argued that the demurrers were properly sustained for want of compliance with the constitutional provision. The information began as follows: "Maclay Hoyne, State's attorney for the said county of Cook, who sues for the People of the State of Illinois in this behalf, comes into court here on this day, and for said People, and in the name and by the authority thereof, according to the form of the statute in such case made and provided, gives the court here to understand and be informed." After the averments of fact the charge is that the franchise of an alleged corporation known as the Purer Ice and Ice Cream Company, the defendants named therein, "during all the

time aforesaid, in the county aforesaid, upon said People have usurped and still usurp, to the damage and prejudice of the said People and against the peace and dignity of the same, whereupon the said State's attorney, for said People, in the name and by the authority thereof, prays the consideration of the court," etc. Courts cannot disregard the requirement of the constitution or permit a prosecution otherwise than as therein provided, but in this case, although the words were not in the precise form contained in the constitution, there was a compliance with the provision.

The information alleged that three persons named therein, on March 27, 1912, filed in the office of the Secretary of State an application for the incorporation of the Purer Ice and Ice Cream Company and statements that the capital stock should be \$150,000, the amount of each share \$100 and the number of shares 1500; that the Secretary of State issued a license to said persons, as commissioners, to open books for subscription to the capital stock; that the said commissioners made a report, sworn to by them, on April 6, 1912, stating, among other things, that the amount of capital stock actually paid in was \$122,100, and showing that the whole stock had been subscribed and giving a list of the original subscribers, when, in truth and in fact, only \$12,000, or 120 shares of the capital stock, had been paid for; that the commissioners, on April 10, 1912, filed said report so made on oath with the Secretary of State, who on the same day issued a certificate that the Purer Ice and Ice Cream Company was a legally organized corporation under the laws of the State. The demurrers admitted the fact alleged that the report of the commissioners sworn to by them of the amount actually paid in on the capital stock was false and that the certificate of complete organization was issued upon the faith of such false report.

The statute authorizing the formation of corporations for pecuniary profit provides for the issuing of a license to commissioners' to open books for subscription to the capital stock of the proposed corporation, and after the capital stock has been fully subscribed the commissioners are required to convene a meeting of the subscribers, upon notice given as provided in the statute, for the purpose of electing directors or managers and the transaction of such other business as shall come before them. The commissioners must then make a full report of their proceedings, including therein a copy of the notice, a copy of the subscription list, a statement of the amount of the capital not less than one-half actually paid in, the amount of capital not paid in, what disposition has been made of stock subscribed and not paid, and if any of the capital stock has been paid in property the same shall be appraised by the commissioners and they shall report the fair cash value thereof. The report is to be sworn to by at least a majority of the commissioners and filed with the Secretary of State, who is then authorized to issue a certificate of the complete organization of the corporation, which shall be recorded in the office of the recorder of deeds of the county where the principal office of the corporation is located, and upon the recording of the copy the corporation shall be deemed fully organized and may proceed to business. The argument in support of the decision of the circuit court is, that the requirement that one-half of the amount of the par value of the capital stock shall be actually paid in before the certificate of organization can lawfully be issued by the Secretary of State is directory, merely, and not mandatory, and if the sworn report states the required fact, the fact that the report is false and the fact does not exist does not render the certificate or the organization illegal. The grounds of the argument are, that the provision is too indefinite and uncertain to be construed as a condition precedent to the issuing of the final certificate, because it does



not directly command that one-half of the capital stock shall be paid and specifies no person or persons to whom it is to be paid, and because the obligation to pay for the stock subscribed for is to the corporation not yet created, and the statute provides that stock may be paid for in installments. The Secretary of State is only authorized to issue the certificate of complete organization upon a sworn report that one-half of the capital stock has been actually paid in, and to us it seems inconceivable that the General Assembly understood that a certificate could be lawfully issued upon a false affidavit of a fact that never existed. It seems to us too plain for argument or discussion that the payment of one-half the capital stock was intended as a condition precedent to the organization of a corporation, and the sworn report was provided for as evidence of the fact. Surely, the want of an express command that payment shall be made would not justify a conclusion that payment was not intended, and the argument that the statute enables persons appointed as commissioners to collect money without responsibility on their part or that capital would lie idle for a period of time should be addressed to the General Assembly, which has expressed its will in the statute that a corporation can only be organized upon the conditions therein specified. The statute authorizes the issue of stock payable in installments at such time or times as shall be determined by the directors or managers, but that provision is not inconsistent with the requirement that one-half must be paid before there is any corporation. An association may be a corporation *de facto* so that its acts and contracts will be legal and binding as between it and individuals, and its corporate existence can only be challenged in a direct proceeding such as this. Decisions relied upon by counsel for appellees are of that character, and it has never been decided that a corporation could be formed without payment of one-half of the capital stock before the final certificate is issued. That question was not decided in

*Foster v. Hip Lung Ying Kee & Co.* 243 Ill. 163, which was a bill in equity by a trustee for an accounting of an alleged partnership, in which it was alleged that a corporation which purchased the property and business of the partnership was fraudulently organized. The court said there was no evidence that one-half of the capital stock had not been actually paid in prior to the report to the Secretary of State and that the legal existence of the corporation could only be determined by a direct proceeding such as this. The decision was that the fact alleged was not proved, and if it had been it would have been of no avail in that suit. The court erred in sustaining the demurrers.

The demurrers were filed on October 22, 1913. Afterward, on December 2, 1913, leave was given defendants to file motions to quash the proceedings. On March 24, 1914, one demurrer was sustained, and on March 27, 1914, motions to vacate the order giving leave to file the information were denied, the demurrers were sustained and the information was dismissed. The defendants took no bill of exceptions to the denial of their motions, which was the proper method of preserving any exception thereto. In this court they asked leave to file a supplemental record, consisting only of a copy of the motions, and, there being no bill of exceptions, leave was denied. One motion stated no reason whatever and the other stated only matters of law, all of which have been disposed of in the foregoing opinion. The record does not show any error in denying the motions.

The judgment of the circuit court is reversed and the cause is remanded to that court, with directions to overrule the demurrers.

*Reversed and remanded, with directions.*

THE PEOPLE *ex rel.* Daniel R. Cameron *et al.* Appellees,  
vs. MICHAEL J. FLYNN, City Treasurer, Appellant.

*Opinion filed October 16, 1914—Rehearing denied Dec. 8, 1914.*

1. STATUTES—*statute should be construed, if possible, to give meaning to all its words.* A statute should be so construed, if possible, as to give effect to each word, clause and sentence, so that no word, clause or sentence shall be rendered superfluous, but it is also the rule that such construction should be adopted as will give effect to the intention of the legislature.

2. MUNICIPAL CORPORATIONS—*city of Chicago has power to determine the amount of city funds to be deposited.* Under the act of 1905, relating to the city of Chicago, the city council has power to designate as many depository banks as it deems necessary; and this power carries with it the authority to fix and determine the amount to be deposited with each depository and to prescribe all necessary rules and regulations with respect thereto.

3. SAME—*sections 64 and 66 of the Chicago code of 1911 are authorized by statute.* The provisions of sections 64 and 66 of the Chicago code of 1911, relating to the designation, by the city council, of depository banks in which the city treasurer shall deposit city funds, are authorized by the act of 1905, relating to the city of Chicago, and are not invalid, as interfering with the powers of the city treasurer conferred by the Cities and Villages act.

4. SAME—*provision of the Chicago ordinance that comptroller shall designate the active bank is not invalid.* The provision of section 64 of the Chicago code of 1911 that the city comptroller shall designate each month, as the active bank, one of the banks selected by the city council as depository banks, is not invalid.

5. SAME—*provisions of sections 64 and 66 of Chicago code apply to "school funds."* The provisions of sections 64 and 66 of the Chicago code of 1911 requiring the city treasurer to deposit city funds in depository banks selected by the council and in the active bank designated by the comptroller apply to "school funds" of the city, as such funds are part of the city's funds, notwithstanding section 137 of the School law requires the city treasurer to hold school moneys as a special fund.

APPEAL from the Superior Court of Cook county; the  
Hon. CLARENCE N. GOODWIN, Judge, presiding.

This was a petition for *mandamus* in the superior court of Cook county, in the name of the People of the State of Illinois, on the relation of sixteen of the twenty-one members of the board of education of the city of Chicago, as members of such board of education, John E. Traeger, city comptroller, and the city of Chicago, appellees, against Michael J. Flynn, city treasurer of the city of Chicago, appellant, to compel him, as such city treasurer, to deposit the school funds of the city of Chicago in certain depositories designated by the city comptroller of the city of Chicago, in accordance with the provisions of certain ordinances of that city. A general and special demurrer to the petition was overruled, and appellant electing to abide by his demurrer, judgment was entered ordering that a writ of *mandamus* issue as prayed. Appellant prayed an appeal to the Appellate Court for the First District, and the trial court being of the opinion that the validity of a municipal ordinance of the city of Chicago was involved and that the cause was of such a character that the public interest required that the same should be passed upon by this court, entered an order that on any appeal or writ of error sued out to review the judgment the cause should be taken direct to the Supreme Court of this State, and it is by virtue of such order that the cause is brought direct to this court, pursuant to the provisions of section 118 of the Practice act.

The petition is voluminous, and as the sole question argued is the validity of certain provisions of an ordinance of the city of Chicago, it will serve no useful purpose to do more than call attention to those facts set forth in the petition which are essential to a clear understanding of the questions presented for decision.

From the allegations of the petition it appears that the city of Chicago has a population of more than 100,000 inhabitants; that its school affairs are conducted by a board

of education consisting of twenty-one members, sixteen of whom are relators in this petition; that John E. Traeger is the city comptroller of the city of Chicago, and appellant, Michael J. Flynn, is city treasurer, whose bond as such treasurer is fixed by the ordinances of the city of Chicago at \$2,000,000, although the money that comes into his hands as treasurer very often is largely in excess of that amount; that the city of Chicago adopted the "act relating to city of Chicago" of May 18, 1905, (Hurd's Stat. 1913, chap. 24, art. 12, p. 291,) and that immediately after the adoption of that act the city council passed an ordinance designed to render the act effective, which was subsequently superseded by a new ordinance, (the one in question,) which forms a part of the general code adopted later and known as the Chicago code of 1911. All of the ordinances passed under the powers granted by the act of 1905 are recited in full in the petition, and show the city council undertook to put the provisions of the act of 1905 into effect and in every way to establish a method of procedure which would conform to the requirements of that statute. These ordinances give the comptroller supervision over the handling of the city's funds, the payment of interest, and require that he advertise for bids for the payment of interest on city funds, etc., and provide for the designation by him, from month to month, of a so-called "active bank," wherein the money as received from day to day is to be deposited during that month, to be distributed later among the other depositaries. These provisions are contained in sections 64 and 66 of the code of 1911 and are the two sections whose validity is attacked here. Those sections are as follows:

"Sec. 64. Of the banks which may have been so designated by the city council as depositaries, the city comptroller shall have power and authority to designate, from time to time, one as the active bank or depositary for a period not longer than one month at a time. During such period the

city treasurer shall deposit in such active bank such sums as will make the balance therein not to exceed \$2,000,000, except as provided in section 26, and shall draw his checks to pay warrants drawn upon him by the mayor and city comptroller upon such active bank: *Provided, however,* that the city treasurer shall have power to withdraw the city's money from any depository in the cases provided for and under the circumstances stated in sections 65 and 66 of this article.

"Sec. 66. There is hereby created a fund to be known as the 'equalization and transfer fund,' and for the purpose of facilitating the equalization or apportionment of the amounts of the balances on deposit with the several depositories and the speedy transfer of money from one depository to another in case of necessity, the mayor and comptroller are hereby authorized to draw warrants, from time to time, for such amounts as may in their judgment be necessary or advisable for the proper apportionment of the city deposits among its depositories or for the protection of the city's interests. Such warrants shall be made payable to the city treasurer and shall be chargeable to such equalization and transfer fund, which shall in turn be credited with the respective amounts thereof deposited with one or more of the other depositories, as the case may be."

On November 15, 1912, the comptroller advertised for bids for banks to act as city depositories, which were duly received and submitted to the city council December 9, 1912. On December 16, 1912, the city council designated all of the banks which had submitted bids, seventy-two in number, as city depositories. All of the banks qualified as depositories by delivering bonds to the comptroller as required by law and by sections 26 and 27 of the ordinance of the city of Chicago. Section 26 requires the city comptroller, in advertising for bids, to give notice that the average monthly balance to be kept in any one bank shall not exceed an amount equal to one-half the capital stock, surplus

and undivided profits of such bank, and that no bank shall have more than \$2,000,000 of city money on deposit at any one time, except during the month when it may be the active bank, when this amount may be increased if occasion demands. Section 27 provides that no award shall be effective until the depositary shall have delivered to the comptroller a bond running to the city of Chicago in an amount equal to the amount which such bank shall be designated as entitled to receive on its bid, with such sureties as the city council shall approve.

The comptroller designated Foreman Bros. Banking Company as the active bank for April, 1913, and notified the city treasurer then in office, and subsequently notified the appellant when he took the office, of such designation. Later, various of the other banks were designated in the same manner, from time to time, by the comptroller as active banks of deposit. Appellant was duly notified in each instance of such designation and his attention called to the manner in which he was depositing school funds, the same being placed to the credit of "M. J. Flynn, treasurer of school funds," instead of to the credit of the city of Chicago, as required by the ordinance. Appellant refused to recognize the authority of the comptroller in the matter of designating the active bank, or of the mayor and comptroller to require a transfer of either the city's corporate or school funds, in making deposits, and deposited both the city's corporate funds and the school funds in such of the seventy-two banks named as depositaries as he saw fit.

From the time of the adoption of the act of 1905 by the city of Chicago until September 1, 1911, the several city comptrollers and city treasurers have recognized and treated school funds as "money of the city," within the meaning of that term as used in the act of 1905. On July 9, 1913, it having come to the notice of the board of education that appellant was not observing the provi-

sions of the ordinance respecting the transferring of the school funds but was depositing such funds to the credit of "M. J. Flynn, treasurer of school funds," the board of education passed a resolution asking the city council that the bond of the city treasurer be increased, and the comptroller recommended to the council that the treasurer's bond be increased to \$10,000,000. Appellant then offered to file an additional bond for \$3,000,000, which offer was accepted by the city council and a resolution was adopted requiring appellant to file an additional bond for \$3,000,000, which he accordingly did. On December 1, 1913, and ever since then, appellant has refused to allow the comptroller access to the books showing the deposits of the school funds and declines to give him any information in regard to the disposition of the school funds, stating that the comptroller is only concerned with the total amount of funds in appellant's hands as such treasurer, so that the comptroller has no means of ascertaining the depositories wherein the school funds are kept or the amount in each depository. According to the information given by the appellant there were \$2,574,802.45 of such funds in his hands on December 15, 1913, of which amount the comptroller learned there was on deposit in one of the depositories, the Fort Dearborn National Bank, a sum in excess of \$2,500,000, made up of corporate and school funds. This amount is in excess of the limitation fixed by the ordinance and the bond given by such depository of \$1,000,000 and in excess of one-half its capital stock, surplus and undivided profits. Neither was it a bank designated by the comptroller as the active bank for that period, or one to which a transfer of any such amount had been authorized to be made during that period of time.

The prayer of the petition was that a writ of *mandamus* issue, directed to Michael J. Flynn, city treasurer of the city of Chicago, commanding him and his successor in office forthwith to deposit in the bank which at the time of the



issuance of the writ is the active bank or depositary of the money of the city of Chicago, all moneys which have come into and then remain in his custody as such city treasurer which were raised by taxation for school purposes or received from the State common school fund or from other sources for school purposes and commonly called "school funds," and commanding and requiring him, as such city treasurer, from the time of the issuance of the writ of *mandamus*, to daily deposit all moneys that shall be received by him as such city treasurer during banking hours, and also such moneys as he may have received on the day previous after banking hours, and which were raised by taxation for school purposes or received from the State common school fund or from other sources for school purposes and commonly called "school funds," in the bank designated or that may from time to time be designated by the relator John E. Traeger, as city comptroller, or his successor, as the active bank or depositary of the money of the city of Chicago, and to make such transfers of such school funds from one city depositary to another as may be directed by the mayor and comptroller of the city of Chicago, in transfer warrants drawn by the mayor and comptroller, in accordance with the ordinances of the city of Chicago, and for other relief, and prays for summons in *mandamus* against the defendant, Michael J. Flynn, as city treasurer of the city of Chicago, etc.

Appellant insists the two principal questions at issue are the construction and validity of the ordinances of the city of Chicago, viz.: (1) That neither section 64 nor 66 has any application to school funds but they apply only to the deposit and transfer of the corporate funds of the city of Chicago, and that if they apply to the school funds they are in contravention of section 137 of the School law and void; and (2) that sections 64 and 66 are also invalid whether they apply to the funds of the city of Chicago alone or to both the corporate and the school funds of the

city of Chicago, as they interfere with the powers of the city treasurer conferred on him by sections 5, 6, 7, 9, 11 and 20 of article 7 and by section 5 of article 12 of the Cities and Villages act, and are therefore void.

FYFFE & RYNER, (COLIN C. H. FYFFE, of counsel,) for appellant.

RICHARD S. FOLSOM, ANGUS ROY SHANNON, BRYAN Y. CRAIG, and LEON HORNSTEIN, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The office of city treasurer is created by section 1 of article 6 of the Cities and Villages act of 1872, and his powers and duties are fixed and prescribed by sections 5 to 12, inclusive, of article 7 of the same act. (Hurd's Stat. 1913, chap. 24, p. 280.) By section 5 it is made the duty of the treasurer to receive all moneys belonging to the corporation and keep his books and accounts in such manner as may be prescribed by ordinance, etc. By section 6 he is required to keep separate accounts of each fund or appropriation, etc. By section 9 of the act he is made custodian of the city's money, which is to be deposited in such depositaries as the city council may select and designate. That section reads as follows:

"Sec. 9. The treasurer may be required to keep all moneys in his hands belonging to the corporation, in such place or places of deposit as may be designated by ordinance: *Provided, however,* no such ordinance shall be passed by which the custody of such money shall be taken from the treasurer and deposited elsewhere than in some regularly organized bank, nor without a bond to be taken from such bank, in such penal sum and with such security as the city council or board of trustees shall direct and approve, sufficient to save the corporation from any loss;

but such penal sum shall not be less than the estimated receipts for the current year from taxes and special assessments levied, or to be levied, by the corporation."

By a subsequent act, passed in 1905, the duties of the treasurer and comptroller and the power of the city council were more clearly defined. (Hurd's Stat. 1913, chap. 24, art. 12, p. 291.) By section 5 of part 2 of that act it is made the duty of the comptroller to advertise for bids for interest on the city's deposits and to report the bids received to the city council, whereupon the city council is to designate as many depositaries for the city's funds as it deems necessary for the protection of the city's interests and may award bids accordingly. A bond, also, is required to be taken from such depositary in such sum and with such sureties as the city council may approve, and the city council is given power to pass all ordinances necessary to carry the provisions of the act into effect and provide rules applicable thereto, and the treasurer is relieved from responsibility for all moneys deposited by him pursuant to the order or ordinance of the city council. The act further provides that in fixing the amount of the bond of the treasurer due regard shall be had of the effect of any such deposits upon the actual amount of money for which the city treasurer may from time to time be held responsible, and that when once deposited the moneys shall not be withdrawn except upon warrants drawn in accordance with the provisions of article 7 of the Cities and Villages act. This act does not repeal the former act but is supplementary to it, and its provisions are to be read in connection with the provisions of the former act, the same as if it were a part of that act.

It is to be observed that the power to designate depositaries is vested in the city council and that the city treasurer has no voice in the matter; that he is made the custodian of the money and is not responsible for such corporate funds as are deposited in city depositaries in accord-

ance with the ordinances, rules and regulations prescribed by the city council; that the money is to be deposited in such "place or places" as may be designated by ordinance, and that the city council may "designate as many depositaries as it deems necessary for the protection of the city's interests," and "shall have power to pass all necessary ordinances" to carry the provisions of the statute into effect and "provide rules applicable thereto." (Hurd's Stat. 1913, chap. 24, pars. 96, 193*aj*.) If the law is as contended by appellant, that as soon as the city council designates one or more depositaries its power is exhausted and the city treasurer may then, at his option, deposit the corporate funds in such one or more of the depositaries named as he pleases, then substantially all of the foregoing provisions of the statute are idle and meaningless. No force or effect whatever can be given to the provisions authorizing the city council to designate "as many depositaries as it deems necessary," if, when in the exercise of that discretion the city council designates seventy-two different banks as city depositaries, the treasurer can nullify such act of the city council and at his option deposit all of the city's funds in but one of such seventy-two banks so designated by the city council as city depositaries. Nor would there be any rules and regulations which the city council could provide, other than those which should govern the treasurer in making deposits of the city's funds in the various depositaries designated by it, as the method for withdrawing funds from the city treasury is fixed and prescribed by the statute, and the city council has no power to prescribe additional rules and regulations in respect to that matter. The only matter open and subject to regulation by the city council, within the provisions of this act, is the deposit of the city's corporate funds. If the city council has no jurisdiction over the city treasurer and the deposits of the city's funds after the depositaries have been named by it, then there is nothing for it to provide rules and regula-

tions for, pursuant to the authority conferred upon it by these various provisions of the statute above referred to. Such a construction would be to render the act, in some of its essential provisions, meaningless and to give to the language of the statute a construction which is always to be avoided, as it is a cardinal rule in construing statutes that they are to be so construed as to give effect to each word, clause and sentence, so that no word, clause or sentence shall be rendered superfluous or void, (36 Cyc. 1128; *Crozer v. People*, 206 Ill. 464;) and at the same time that construction is to be adopted which will give effect to the intention and object of the legislature in adopting the enactment.

One of the objects sought to be accomplished by the act of 1905 was to enable cities to secure interest on their deposits of corporate funds. In order to do this and to secure the highest rate obtainable the statute requires the comptroller to advertise for bids on such deposits, and vests in the city council authority to designate as many banks as city depositaries as it shall deem necessary and proper and for the best interests of the city. This provision was essential to enable the city to secure the highest rate of interest obtainable on its funds. The revenues derived by the city of Chicago from general taxation and other sources are by far too large to be handled successfully, at a reasonable rate of interest, by any one banking institution. The petition shows that the tax levy for school purposes alone for the year 1913 was \$18,941,250, and that the monthly receipts and deposits of the city are, in the aggregate, from \$2,000,000 to \$5,000,000 per month. But few, if any, banking institutions could be found which would undertake to pay interest at the rate of two and one-half per cent upon such a large amount of money, which might be very much in excess of its demands and more than it could use to advantage, while, on the other hand, if the same amount were distributed among several banks in accordance with

their needs or demands quite the reverse might be true. To meet such conditions as these the legislature has vested in the city council full power and authority to designate as many depositaries as it deems necessary and proper for the best interests of the city. This authority expressly granted carries with it, as an incident to that power, full power and authority to fix and determine the amount to be deposited with each depositary and to prescribe all necessary rules and regulations for carrying the power thus expressly granted into full force and effect. (28 Cyc. 262, 263; *Gundling v. City of Chicago*, 176 Ill. 340.) In the exercise of its discretion the city council of Chicago designated seventy-two banks as city depositaries, and by ordinance fixed the maximum amount which might be deposited in any one depositary and prescribed the rules and regulations which should govern the comptroller and treasurer in making such deposits. In our judgment the provisions of sections 64 and 66 of the ordinance in question do no more than prescribe such rules and regulations and are fully authorized by the provisions of the statute hereinbefore set forth. They are also fully authorized by the provisions of section 20 of article 7 of the Cities and Villages act, which confer power and authority upon the city council to provide and establish such additional rules and regulations for the collector, treasurer and all other officers connected with the receipt and expenditures of the corporate funds as it shall deem proper, which provisions, as pointed out above in referring to section 5 of article 12 of the same act, would be wholly meaningless unless they had reference to the prescribing of rules and regulations regarding the deposit of the city's corporate funds.

Neither do we think the ordinance is invalid because it authorizes the city comptroller, instead of the city council, to designate the so-called "active bank" of deposit for each month. The office of the city comptroller is created by section 17 of article 7 of the Cities and Villages act, which

provides that the comptroller shall exercise a general supervision over all officers of the corporation charged in any manner with the receipt, collection or disbursement of corporation revenues and the collection and return of all such revenues into the treasury. By section 18 of the same article it is further provided that when a comptroller is appointed in any city, "the city council may, by ordinance or resolution, confer upon him such powers, and provide for the performance of such duties by him, as the city council shall deem necessary and proper; and all the provisions of this act relating to the duties of city clerk, or the powers of city clerk in connection with the finances, the treasurer and collector, or the receipt and disbursements of the moneys of such city, shall be exercised and performed by such comptroller, if one there shall be appointed; and to that end and purpose, wherever in this act heretofore the word 'clerk' is used, it shall be held to mean 'comptroller;' and wherever the 'clerk's office' is referred to, it shall be held to mean 'comptroller's office.'" In designating the active bank of deposit for each month and ordering a transfer of the funds from one bank to another so as to comply and conform to the provisions of the ordinance here in question the comptroller is in the exercise of his general supervisory powers over an officer charged with the receipt of corporate revenues, and the provisions of sections 64 and 66 of the ordinance in this respect are fully warranted by the provisions of sections 17 and 18 of article 7 of the Cities and Villages act.

It is further insisted that these provisions of the ordinance are invalid, at least in so far as the school funds are concerned, for the reason that section 137 of the School law provides that "all moneys raised by taxation for school purposes or received from the State common school fund, or from any other source for school purposes, shall be held by the city treasurer as a special fund for school purposes, subject to the order of the board of education, upon war-

rants to be countersigned by the mayor and city comptroller, or if there be no city comptroller, by the city clerk." (Hurd's Stat. 1913, p. 2208.) Appellant's argument is, that inasmuch as the statute requires that this fund shall be held by him as a special fund, subject to the order of the board of education, the city council has no authority to in any way regulate or control his acts in making deposits of such fund. While it is true that the school fund is a special fund raised for a special purpose, it is nevertheless a part of the city's funds and received and held by the treasurer by virtue of his office as such city treasurer. (*Brenan v. People*, 176 Ill. 620.) No new or additional bond is required of the treasurer for the safe keeping of this fund. His duties with respect to its safe keeping are in no way different from his duties in respect to the funds levied and collected for special assessment purposes. The language of the two provisions in this respect is similar. With respect to the latter fund, section 12 of article 7 of the Cities and Villages act provides that "all moneys received on any special assessment shall be held by the treasurer as a special fund, to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever, unless to reimburse such corporation for money expended for such improvement." The language of section 137 of the School law, in so far as the duties of the treasurer are concerned with respect to that fund, is identical with that of section 12, *supra*. In each instance the statute directs the money realized from such special assessment or school levy *shall be held by the city treasurer as a special fund*. The duties of the treasurer with respect to each fund are therefore, in so far as its identity as a fund is concerned, the same. In each instance each fund is to be held by him as a special fund, to be applied to a special purpose. That a special assessment fund is included within the provisions of section 9 of article 7 of the Cities and Villages act there



can be no doubt, as the section expressly provides that in fixing the bond of the city depositaries the penal sum of such bond "shall not be less than the estimated receipts for the current year from taxes and special assessments levied, or to be levied, by the corporation."

Section 137 of the School law does not require that the city treasurer shall *deposit* the school funds as a special fund, but only requires that they shall be held by him as a special fund for the payment of the indebtedness properly chargeable against that particular fund, the same as special assessments are to be held for the purpose of paying for the cost of an improvement. The ordinance in question in no way interferes with the provisions of the statute. It does not contemplate the paying out of school funds or the withdrawing of the same from the custody of the city treasurer. On the contrary, it simply provides the means by which the special fund in the hands of the treasurer may be transferred from one depositary to another in the manner provided in said ordinance and still remain in the custody of the treasurer, subject to the order of the board of education for the payment of all legitimate demands against that fund. It therefore cannot be said to be in conflict with the provisions of section 137 of the School law.

As it is admitted by appellant that he has wholly failed and refused to comply with the provisions of the ordinance as hereinbefore set forth, we are of the opinion that the writ of *mandamus* was properly ordered to issue, and for the reasons given, the judgment of the superior court of Cook county will be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Joseph T. Cougill, County Collector,  
Appellee, *vs.* THE ILLINOIS CENTRAL RAILROAD COM-  
PANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—*when a road district tax is invalid.* A road district tax attempted to be levied under the former Roads and Bridges law after the same had been repealed by the new Roads and Bridges law in force July 1, 1913, is invalid and its collection cannot be enforced.

2. SAME—*amount voluntarily paid for road district tax cannot be set off against other taxes.* The fact that a railroad company voluntarily pays a road district tax does not entitle it to have such payment credited upon a subsequent road and bridge tax levied under the act of 1913.

APPEAL from the County Court of Cumberland county;  
the Hon. S. B. RARIDEN, Judge, presiding.

LEVI N. BREWER, (JOHN G. DRENNAN, of counsel,)  
for appellant.

WALTER BREWER, State's Attorney, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cumberland county for taxes alleged to be due and unpaid against the property of appellant, the Illinois Central Railroad Company.

Appellant owns and operates its railroad through said county, and it appears has paid all taxes assessed against its property for the year 1913 in said county except certain amounts to which objections were filed herein. The taxes in question were road and bridge taxes in the towns of Cottonwood, Sumpter and Greenup and district road taxes in road districts Nos. 9 and 10 and in the village of Toledo, in said county. All these towns and districts were acting, prior to July 1, 1913, under what was then known as the

Labor System Road law. (Hurd's Stat. 1911, chap. 121, secs. 80-124, inclusive.) This act was, in terms, repealed by the Road and Bridge law which went into force July 1, 1913. (Hurd's Stat. 1913, sec. 169, p. 2153.) While this latter act contained certain provisions as to continuing in office the road officials acting under the old road and bridge acts until new officials could be elected under the act of 1913, and keeping alive, possibly, in certain other particulars the provisions of the old law, the act does not in any way, so far as we are advised, attempt to keep alive the provisions of the former road and bridge acts as to levying and collecting taxes, there being complete provisions on these matters in said act of 1913.

The levy as to the district road tax, under the old law, in road districts Nos. 9 and 10 and in the village of Toledo, in said county, amounting, respectively, to \$35, \$24 and \$17.48, was made by the county board of Cumberland county at its September meeting, 1913. This tax was levied under the provisions of the old law, which law at the date of such levy had been repealed by the said Road and Bridge law in force July 1, 1913. Counsel for appellee contend that this tax became valid upon the delivery of the road tax list to the overseer of highways, and that the action of the county board was not necessary in order to make it a valid tax. With this we cannot agree. That identical question was decided by this court in *People v. Chicago and Illinois Midland Railway Co.* 260 Ill. 624, and it was there held that there was no valid tax which could be enforced as a lien upon land until the board of supervisors made the levy. It has been held that a tax levy under a law after its repeal, and not in accordance with the law in force at the time of the levy, is invalid and its collection cannot be enforced. (*Burbank v. People*, 90 Ill. 554; *People v. Toledo, St. Louis and Western Railroad Co.* 249 id. 175.) This being the law, the county court erred in not sustaining the objections as to the district road tax in

road districts Nos. 9 and 10 and in the village of Toledo, amounting, in all, to \$76.48.

Appellant further argues that the trial court erred in not sustaining objections to the road and bridge tax of \$60.52 in the town of Cottonwood, \$66.71 in the town of Sumpter and \$93.25 in the town of Greenup, on the ground that each of these amounts had been paid in the three respective towns by the objector as a district road tax before the three sums, respectively, had been levied by the county board as a road and bridge tax at its September meeting, 1913, under said Road and Bridge law of July 1 of that year. The appellant contends that the court should give it credit for these amounts in the respective towns as having been paid on the district road tax of that year, to apply on the levy of the road and bridge tax under the law now in force; that under this last named law the road and bridge tax covers and forms a part of the tax known formerly as district road tax, and that appellant had in good faith paid the money charged as district road tax in each of the said towns, which were then under what is known as the labor system, and having paid the same for road purposes under the old law was entitled to credit for such taxes under the new law. To permit appellant to set off against a valid road and bridge tax under the present law an amount it has voluntarily paid for a district road tax under a former law not now in force would permit it to recover back taxes voluntarily paid. This court has repeatedly held that if a property owner voluntarily pays certain taxes which he might have successfully defended he cannot recover the amount so paid, (*Falls v. City of Cairo*, 58 Ill. 403; *Walser v. Board of Education*, 160 id. 272; 2 Cooley on Taxation,—3d ed.—1495, and note,) or set off such taxes against other unpaid taxes. (*People v. Chicago, Burlington and Quincy Railroad Co.* 247 Ill. 340; *People v. Chicago and Alton Railroad Co.* 247 id. 373; 1 Cooley on Taxation,—3d ed.—20, and note 6.) The county court did

not err in overruling the objections as to the road and bridge taxes in the three towns last referred to.

For the reasons already given the judgment of the county court will be reversed and the cause remanded to that court, with directions to enter an order in accordance with the views herein set forth.

*Reversed and remanded, with directions.*

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JENNIE E. HARRISON, Appellee, vs. HELEN E. HARRISON  
*et al.* Appellants.

*Opinion filed December 16, 1914.*

1. TRUSTS—*when resulting trust arises.* Where land is purchased and paid for with the money of one person but the title is taken in the name of another who is not the child or the wife of the former, a resulting trust arises in favor of the person whose money paid for the land.

2. SAME—*source from which person obtained the money is immaterial if it was her own.* If the money paid by a young woman for land, the title to which was taken in the name of the mother of her affianced husband, was, in fact, her own money, it is not material that the money, or a part of it, was given to her by her affianced husband.

3. SAME—*what averments do not allege express trust.* Averments that the complainant in the bill consented and agreed that the title to premises purchased with her money should be placed for the time being in a certain person in trust for complainant and that the premises were so conveyed by warranty deed to such person do not allege an express trust, there being no allegation that the grantee agreed to hold the title in trust or agreed to anything.

4. SAME—*when statements of the husband do not affect wife's right to have trust declared.* Where a woman has purchased land and had the title conveyed to a third person to hold for her, her right to have a resulting trust declared is not affected by acts or statements of her husband, not authorized or assented to by her, designed to show that the title was conveyed in trust to aid the husband and wife in carrying on the illegal business of "bootlegging."

5. SAME—*when the record of the husband's conviction is irrelevant.* In a proceeding to establish a resulting trust in favor of the complainant in land the title to which is in the name of the mother of complainant's husband, the record of a conviction of the husband for maintaining a nuisance and ordering that "the place where such liquor was so sold be shut up and abated" is irrelevant and is properly denied admission in evidence.

APPEAL from the Circuit Court of Marion county; the Hon. THOMAS M. JETT, Judge, presiding.

JOHN S. STONECIPHER, and KAGY & VANDERVORT, for appellants.

GEORGE W. SMITH, and JONAS & HALEY, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Marion county setting aside a deed, upon a bill filed by the appellee, Jennie E. Harrison, against the appellants, Helen E. Harrison and Peter L. Guth.

The bill alleged that on September 16, 1911, the appellee purchased two lots in Salem, Illinois, for \$700, for which she paid cash; that at that time she was unmarried and was engaged to marry Haste E. Harrison, a son of the appellant Helen E. Harrison, by reason whereof she consented that the title to the premises for the time being should be placed in Helen E. Harrison in trust for her, whereupon, in consideration of the sum of money paid by the appellee, the premises were conveyed to Helen E. Harrison. After the conveyance the appellee took possession of the premises and ever since has been in possession thereof with the full knowledge and consent of Helen E. Harrison, who has never exercised or claimed to exercise any right of ownership or possession, but has always assented that the premises were in truth and in fact the property of the appellee. On December 27, 1913, while the appellee was in possession of the premises as owner, living therein with her husband and family, Helen E. Harrison, without

consideration, executed to Peter L. Guth, who was her son-in-law, a warranty deed for the premises, and said Peter L. Guth received and accepted such deed, then and there knowing that the appellee was, in fact, the owner thereof and that Helen E. Harrison held title thereto in trust for the appellee.

The evidence sustains the allegations of the bill. It is admitted that Helen E. Harrison did not purchase the property, paid nothing for it, never was in possession of or claimed any interest in the premises or exercised any acts of ownership over them, and that the appellee actually paid all the money that was paid for the purchase of them. It was shown, without contradiction, that the appellee took possession of the premises immediately after the purchase, has made improvements on them, and has since occupied them as a residence with Haste E. Harrison, whom she married after the conveyance. The appellant Guth had knowledge of her ownership, both by the fact of her possession and by actual notice. Where land is purchased and the consideration is paid with the money of one person but the title is taken in the name of another, a resulting trust arises in favor of the person whose money paid for the land. *Bruce v. Roney*, 18 Ill. 67; *VanBuskirk v. VanBuskirk*, 148 id. 9; *Brennaman v. Schell*, 212 id. 356; *Lord v. Reed*, 254 id. 350; *Froemke v. Marks*, 259 id. 146.

The appellants contend that Haste E. Harrison paid the consideration which was paid when the deed was made and that the appellee had no means with which to make such payment. The appellee received the money which was paid, or a part of it, from Haste E. Harrison. There is no contradiction in the evidence that whatever money she received from him he delivered to her for her own, whether in payment of a debt or otherwise. After she received the money it was hers. The source from which it came was immaterial, and if she used it in the purchase of this property she is entitled to the property. *Lord v. Reed*, *supra*.

It is argued that the bill alleges an express trust, and that where an express trust exists there can be no implied or resulting trust; that no express trust is proved, and that proof of an implied or resulting trust will not sustain a bill alleging an express trust, since there would be a variance between the bill and the proof. No express trust is alleged. The allegations of the bill in this respect are, that the appellee "consented and agreed that the title to said premises for the time being should be placed in said Helen E. Harrison in trust for your oratrix, whereupon the said Reuben C. Hays \* \* \* made, executed and delivered to the said Helen E. Harrison, in trust for your oratrix, a certain warranty deed of that date, wherein and whereby they conveyed to the said Helen E. Harrison, in trust for your oratrix, the said above described premises." There is no allegation that Helen E. Harrison agreed to hold the premises in trust or agreed to anything. The allegation is simply that the appellee purchased the premises and paid for them and by her consent and agreement the title was taken in the name of Helen E. Harrison. From these facts the law implies a resulting trust without any agreement on the part of the grantee in the deed. No such agreement was either alleged or proved.

It is contended that the title to the property was placed in Helen E. Harrison for the purpose of aiding the appellee and her husband in carrying on the illegal business of "boot-legging" whisky. This contention is based on the testimony of Haste E. Harrison's sister that when the purchase was being discussed by the appellee, Haste and his mother, Haste said, "We cannot buy the place because they would take it away from us on account of illegal boot-legging," to which his mother answered, "Well, you can put it in my name," and Haste and his wife then said, "Yes, we will do that." At another time in her testimony she said that Haste and the appellee said they would put the property in his mother's name, and his mother said, "All



right, if you will quit this boot-legging," and they promised her they would. Helen E. Harrison testified that in a conversation with Haste and the appellee she told Haste that if he would quit boot-legging he could put the title in his mother's name, and he said he would quit. There is no evidence that the appellee was engaged in boot-legging, and the evidence does not sustain this contention. The appellee had the right to buy the property with her own money, and her right to it cannot be affected by the acts or statements of her husband, before or afterward, which she did not authorize or assent to.

The record of a conviction of Haste E. Harrison for maintaining a nuisance and ordering that "the place where such liquor was so sold be shut up and abated" was offered in evidence by the appellants. It was irrelevant and an objection to it was properly sustained.

The decree is affirmed. •

*Decree affirmed.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ALEX NOVICK, Plaintiff in Error.

*Opinion filed December 16, 1914.*

1. CRIMINAL LAW—*what not essential to the crime of burning property to defraud an insurance company.* The intent is the controlling element of the crime of burning property to defraud an insurance company, and the crime is complete if the act is done with the intent to defraud the insurance company even though the property is not covered by a valid policy, and it is therefore not material that the policy misdescribes the location of the building.

2. SAME—*corporate existence of corporation may be proved by oral testimony if no objection is made.* In a criminal prosecution for burning property with intent to defraud an insurance company, the corporate existence of the company may be proved by oral testimony if no objection is made to such proof.

3. SAME—*if instructions are contradictory one cannot cure error in another.* Instructions may supplement each other and should be considered as a series, yet each one must state the law correctly

as far as it goes and all should be in harmony so the jury will not be misled, but if the instructions are contradictory one instruction cannot cure error in another.

4. SAME—*instruction in criminal case should not assume a disputed fact.* In a prosecution for burning property to defraud an insurance company it is error to assume in the People's instructions that the building was set on fire, where the crucial question in the case is whether the origin of the fire was accidental, as contended by the accused, or intentional, as contended by the People.

5. SAME—*knowledge and consent are not equivalent to aiding, abetting and assisting.* An instruction in a prosecution for burning property with intent to defraud an insurance company is erroneous which states that the accused is guilty as a principal if the building was burned with his knowledge and consent, as there is a clear distinction between consenting to a crime and aiding, abetting or assisting in its perpetration.

WRIT OF ERROR to the Circuit Court of Saline county;  
the Hon. W. N. BUTLER, Judge, presiding.

J. L. THOMPSON, and J. B. LEWIS, for plaintiff in error.

P. J. LUCEY, Attorney General, M. S. WHITLEY, Special State's Attorney, GEORGE P. RAMSEY, C. H. LINSBOTT, W. F. SCOTT, and CHARLES E. COMBE, for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error, Alex' Novick, was tried and convicted at the April term, 1914, of the circuit court of Saline county for the crime of burning property to defraud an insurance company and sentenced on this verdict to the penitentiary. The case has been brought to this court by writ of error.

March 5, 1912, plaintiff in error resided in the village of Dorrisville, in Saline county, in a building which he owned and occupied as a residence and in which he also conducted a general store and meat market. The building consisted of four rooms, facing east on a north and south road. The south front room was occupied for the store. Just back of it was a small room used for storage purposes.

The north back room was a kitchen, and the north front room was used for a bed-room and sitting room. At that time there were three stoves in the building,—one in the store, one in the bed-room and one in the kitchen,—the pipes of which all ran into the same flue in the partition between the rooms. On the date last mentioned three fires occurred in the building,—the first in the morning, between nine and eleven, the second an hour or two later, and the third some time after half-past three in the afternoon. This last fire destroyed the building and contents. The testimony tends to show that the weather was quite cold that day and there was snow on the ground; that there was a hot fire in two stoves in the morning, one being red-hot. When the first fire occurred in the forenoon, the testimony is to the effect that plaintiff in error called for help and with the assistance that came extinguished the fire. The evidence is not very clear as to just what took place at this first fire or how much or what part of the building was burned at that time. The testimony which, it is argued, tends to incriminate plaintiff in error has reference to the second fire. A good deal of testimony was taken as to what occurred in and about the building at that time, and this testimony is quite contradictory, especially with reference to what plaintiff in error said and did. John R. Stone, the village marshal of Dorrisville, testified that he was notified on the telephone of the second fire and came over to the store before it was put out; that when he reached there he found several persons standing outside and the plaintiff in error in the store; that he asked the latter where the fire was, and the plaintiff in error said that it was in the other room; that he (Stone) then said, "Well, show us where it is and we will put it out," and plaintiff in error replied, "Too much smoke," and said to him, "Let it burn and I will give you ten dollars;" that witness then opened the door to the room where the fire was and the smoke cleared out. Plaintiff in error on the stand denied

that he had this conversation with the marshal. No one else heard it, although it seems that several persons were in and about the store at the time. Several other witnesses testified that plaintiff in error did not attempt in any way to put out this second fire, some saying that he walked up and down the porch and acted as if he were crazy or drunk; others stating that he seemed to be entirely indifferent as to what was going on. Quite a number of witnesses testified in his behalf that he assisted in extinguishing the fire. After it was extinguished plaintiff in error gave a cigar to each of those who helped. The testimony is to the effect that during both the first and second fires plaintiff in error requested persons who attempted to take goods out of the building not to do so, stating they would be stolen if they were carried out, as had happened at a fire not long before in the same village to goods taken out of the building. After the second fire J. B. Belt, who represented the insurance company which had insured the goods and building in question, came to the house and had a talk with plaintiff in error. From his and other testimony in the record it appears that after the second fire they found a hole burned in the floor of the room used for a bed-room. There was also evidence that the partition and ceiling of the bed-room, if not in the other rooms, were burned. Belt testified that in his talk with plaintiff in error he told him that if he (plaintiff in error) burned the building no insurance could be recovered, and asked him for the insurance policies, and plaintiff in error said they were at the bank. It appears from the evidence that plaintiff in error's wife had carried the policies away with her when she left after the first fire. The testimony tends to show that she was in a delicate condition and became somewhat excited, and for that reason she was advised to go to the home of one of the neighbors. The third fire, which destroyed the building and contents, occurred late in the afternoon when plaintiff in error was not at home. He testified that he had

gone on horseback to Harrisburg, about a mile and a half distant, to see about a wagon left there for repairs, and when he found it was not ready went to Gaskins City to see a niece who was very sick and stayed there until after five. When he returned to Dorrisville the building and contents had been destroyed. There is no contradiction of his testimony that he was in Harrisburg and Gaskins City as he stated and that he was not in or about the building at the time of the third fire. The man he left in charge of the store was not called as a witness, plaintiff in error claiming he could not be located.

There is no direct proof in the record as to how the fires originated. The testimony of some of the witnesses for plaintiff in error emphasized the fact that one of the stoves was red-hot. Others testified they saw no connection between the stove and pipe and the fire. Plaintiff in error himself stated that his attention was first attracted by smoke coming through the crack of the door, and that he then noticed fire under the stove and the paper on the wall cracking. The State contends that the evidence tends to show that the building was set on fire by plaintiff in error or some other person under his direction, while the defense contends that all three fires were accidental. Plaintiff in error had the building insured for \$650, the merchandise and fixtures for \$1275 and the household goods for \$350,—a total of \$2275. Counsel for plaintiff in error argue that the evidence shows that the total loss by fire to the building and contents was \$2761.

Counsel for defendant in error insist that the certificate of the trial judge fails to show that the bill of exceptions contains all the evidence or all the rulings of the court, and that therefore this court cannot pass on the weight of the evidence, or the propriety of giving or refusing certain instructions, or the correctness of the rulings of the trial court which are questioned by plaintiff in error. With this we cannot agree. The fact appears affirmatively from the

record that the trial judge certified that the bill of exceptions contained all the evidence and the rulings of the court. See *Hutchinson v. Bambas*, 249 Ill. 624; *Grand Lodge A. O. U. W. v. Ehlman*, 246 id. 555; *People v. Henckler*, 137 id. 580; *Harris v. Miner*, 28 id. 135.

Counsel for plaintiff in error contend that there is a fatal variance between the proof as to ownership of the building and the description as found in the insurance policy. The proof shows that the building was located on lot 1 in block 15, in Sloan's First addition to Dorrisville; the policies of insurance described it as being on lot 1 in block 16, in said addition. This indictment was founded on section 14 of the Criminal Code. The intent as to the crime in this case is the controlling element. The crime is complete if the act is done with intent to defraud any insurance company, even though the property attempted to be destroyed is not covered by a valid policy or one that could be enforced by law. *McDonald v. People*, 47 Ill. 533; *Mai v. People*, 224 id. 414.

It is further argued in this connection that no proof was made as to the incorporation of the insurance company. It was assumed by both parties in introducing their evidence that the insurance company was duly incorporated, and no objection was made as to this manner of proof. In a criminal prosecution for an offense committed against a corporation, the corporate existence, if no objection is made, may be proved by oral testimony, as it was here. 3 Ency. of Evidence, 604; *Reed v. State*, 15 Ohio, 217; *People v. Burger*, 259 Ill. 284.

Counsel further argue that the evidence was not sufficient to justify a conviction. While we do not agree with this contention, the evidence was of such a character that the rulings as to the evidence and the giving and refusing of instructions should have been accurate. The eighth instruction given for the People reads:

"It is not necessary, in order to secure a conviction in this case, that the prosecution prove or that the evidence show that the defendant, Alex Novick, was present at the time the property was set on fire, but it is sufficient if the jury believe from the evidence, beyond a reasonable doubt, that before it was set on fire he had advised, aided or encouraged the thing to be done and that he had consented that it should be done, then and in such case he would be just as guilty, under the law, as though he had done the act with his own hand."

Plaintiff in error argues that this instruction assumes that the building was set on fire. One of the crucial questions in the case was the origin of the fire,—whether it was caused by accident or intention. This court has repeatedly held that where facts are controverted and the evidence is conflicting, it is error to assume such controverted facts to be true. (*Chambers v. People*, 105 Ill. 409; *Hellyer v. People*, 186 id. 550; *Foglia v. People*, 229 id. 286; *People v. Feinberg*, 237 id. 348; *People v. Harris*, 263 id. 406.) Counsel for the State argue that all the evidence showed that the building was burned, consequently it must have been set on fire, and that this instruction assumed nothing more than that the building was burned. With this we cannot agree. The instruction manifestly assumes that the building was intentionally set on fire by some person as an active agent, and not simply accidentally burned. People's instructions 8 and 9 were erroneous in the same particular, in assuming that the building was set on fire. The modification in plaintiff in error's instruction 42 also assumed the same controverted fact. It is the province of the jury, and not of the court, to pass on the sufficiency of evidence as to questions of fact, and it is difficult to tell what influence the giving of these instructions had upon the jury. It is argued, however, by counsel for the State that other instructions given stated the law correctly on this point and the jury were therefore not misled. It is true,

instructions may supplement each other and may be considered as a series, yet each one must state the law correctly as far as it goes, and all should be in harmony, so that the jury may not be misled. (*Ratner v. Chicago City Railway Co.* 233 Ill. 169.) When instructions are contradictory one cannot cure the error of the other, since it is impossible to tell whether the jury followed the one laying down the correct rule of law or the erroneous one. (*Enright v. People*, 155 Ill. 32; *People v. Lee*, 248 id. 64.) These instructions stated the law incorrectly, and even though there may have been other correct instructions on the same subject it is impossible to tell which the jury followed.

Instruction 6 was also erroneous in instructing the jury that plaintiff in error was guilty as principal if the building was burned with his knowledge and consent. Such is not the law. This court has stated that there is a plain distinction between consenting to a crime and aiding, abetting or assisting in its perpetration. "Aiding, abetting or assisting are affirmative in their character. Consenting may be a mere negative acquiescence not in any way made known at the time to the principal malefactor. Such consenting, though involving moral turpitude, does not come up to the meaning of the words of the statute." *White v. People*, 81 Ill. 333; *Jones v. People*, 166 id. 264.

The giving of the above instructions was reversible error. Other errors are urged as to the giving and refusing of instructions and the admission of evidence, none of which we find it necessary to consider in this opinion.

The judgment of the circuit court is reversed and the cause remanded.

*Reversed and remanded.*



THE PEOPLE *ex rel.* Joseph Brockamp, County Collector,  
Appellee, *vs.* W. H. MOORE, Appellant.

*Opinion filed December 16, 1914.*

1. SPECIAL TAXATION—*when supervision of a sidewalk is controlled by general ordinance.* Where a general sidewalk ordinance provides that sidewalks shall thereafter be constructed under the general supervision of the city engineer and sidewalk committee, and a subsequent special ordinance for a sidewalk merely provides that the work shall be done under the Sidewalk act of 1875 as amended in 1905, without mentioning any officer or board to supervise the work, the supervision of the sidewalk is controlled by the general ordinance.

2. SAME—*what a compliance with statute as to filing a special tax list.* The provision of the Sidewalk act requiring a special tax list to be prepared by the officer or board having charge of the construction of the sidewalk and filed in the office of such officer or board is complied with where the list is filed, as required by the special ordinance, in the office of the city engineer, who, with the sidewalk committee, had charge of the construction of the walk; and the fact that a copy of the list is filed in the office of the city clerk does not affect the situation.

3. SAME—*when bill of costs is sufficient.* A bill of costs showing, in separate items, the cost of excavating, cost of materials and the cost of laying down and supervision of the work sufficiently complies with the Sidewalk act as amended in 1905, requiring the bill of costs to show the "cost of the construction and supervision" of the sidewalk.

APPEAL from the County Court of Christian county;  
the Hon. C. A. PRATER, Judge, presiding.

GEORGE T. WALLACE, for appellant.

EDWARD E. ADAMS, for appellee.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Christian county overruling appellant's objections and rendering judgment upon the application of the county collector against a lot of appellant in the city of Taylorville

for the cost of a sidewalk built by the city authorities after notice to and refusal by appellant to build the walk pursuant to the statute and a special ordinance.

On October 11, 1906, the city council of the city of Taylorville passed what is called a general sidewalk ordinance under the act of the legislature of 1875, which ordinance provided that after its passage, sidewalks, unless otherwise specially ordered, should be constructed by special taxation, three-fourths of the cost to be paid by the abutting property owners and one-fourth by general taxation, and that for each sidewalk to be so constructed a special ordinance should be passed describing the width, material and manner of construction. June 17, 1912, the city council passed a special ordinance requiring the construction of the sidewalk upon which appellant's property abutted and he was notified to build it. Failing to do so, the city built the same and taxed the costs of its construction to appellant's property. He failed to pay the tax and the collector made application to the county court for judgment and order of sale. Appellant filed objections, but the county court overruled them and rendered judgment against the property for the tax, from which judgment appellant prosecuted an appeal to this court, where the judgment was reversed for error of the county court in overruling three of appellant's objections and the cause was remanded, with directions to the county court to sustain said three objections. (*People v. Moore*, 261 Ill. 549.) The three objections we held the county court should have sustained were, (1) that the bill of costs required by the statute and ordinance was defective, in that it stated the cost per lineal foot instead of the cost of "construction and supervision," as required by the statute; (2) no special tax list was prepared and filed; (3) no warrant was issued for the collection of said tax. The special ordinance under which the walk was constructed and the tax levied, provided for the construction of the walk within thirty days after the mailing of notice

by the city clerk of the passage "of such general sidewalk ordinance." We held the special ordinance was defective in that respect and should have given the property owner thirty days' notice after the passage of the special ordinance, using the words "this ordinance" instead of "such general sidewalk ordinance." After the former decision the city council, under the authority of the Sidewalk act as amended in 1905 and 1907, (Laws of 1905, p. 89; Laws of 1907, p. 200;) passed a new ordinance under which a new tax was made and returned, and such proceedings were had that the county court, over appellant's objections, rendered judgment for said tax, and this appeal is prosecuted from that judgment.

On the former appeal appellant contended the special ordinance was void and again makes the same objection. The effect of our former decision was that the ordinance was not void but was defective in the respect pointed out, and that question is not now open for consideration. The only questions proper for our consideration on this appeal are such as are raised under the special ordinance passed after the reversal of the former judgment.

By section 2 of the Sidewalk act the city council may provide that the construction of a walk, under the provisions of that act, shall be under the supervision of and subject to the approval of some officer or board of the city to be designated in the ordinance. The general sidewalk ordinance of 1906 provided that sidewalks should be constructed under the general supervision of the city engineer and sidewalk committee. The special ordinance under which the walk was constructed required the work to be done "under and by virtue of the Sidewalk act of 1875, as amended in 1905," but made no specific mention of any officer or board who should have charge of the work. The construction of the walk was therefore under the supervision of the city engineer and the sidewalk committee.

Section 3 of the statute provides that a bill for the cost of the sidewalk, showing the cost "of the construction and supervision thereof," shall be made by the officer or board designated to take charge of the construction of the walk and the cost levied as a special tax against the property. The officer or board is required to prepare a special tax list against the property, which is to be filed in the office of said officer or board, whereupon warrants are to be issued to the collector for the collection of the special tax. The ordinance provides that the special tax list here involved should be filed in the office of the city engineer and a copy in the office of the city clerk. It is objected that this is not a compliance with the statute. We think the objection not tenable. Filing the list in the office of the engineer was a sufficient compliance with the statute. Filing a copy of it with the city clerk was in addition to the statutory requirements.

It is also objected the bill of costs filed was insufficient and not in compliance with the requirements of the law. The bill shows in separate items the cost of excavating, cost of materials and the cost of laying down and supervision of the work. The original act of 1875 required the bill of costs to show in separate items the cost of grading, materials, laying down and supervision. As amended in 1905 the act requires a bill of costs to be made "showing the cost of the construction and supervision thereof." The bill of costs was sufficient under the act as amended.

Some other objections of a technical character are made to the sufficiency of the bill of costs and also to the tax list filed, but in our opinion they are without merit.

The judgment of the county court is affirmed.

*Judgment affirmed.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. EDWARD GEROLD, Plaintiff in Error.

*Opinion filed December 16, 1914.*

1. CRIMINAL LAW—*statute relating to change of venue should be construed the same in civil and criminal cases.* A statute relating to change of venue should receive a reasonable construction, and the construction should be the same in civil and criminal cases.

2. SAME—*the rule as to a change of venue for prejudice of the judge.* A party applying for a change of venue for prejudice of the judge obtains all the relief he is entitled to when another judge who has no interest in the case and is unprejudiced is called in to try the case.

3. SAME—*change of venue for prejudice of judge does not require removal of case to another county.* The statute providing for a change of venue because of prejudice of the judge was not enacted for the purpose of allowing a change of venue from the county, as in case of prejudice of the inhabitants.

4. SAME—*when result of examination of books and documents may be given by a witness.* Where original evidence consists of numerous books, documents, papers and records which cannot be conveniently examined in open court and the fact to be proved is the general result of an examination of the whole collection, evidence as to such result may be given by any competent person who has examined the originals, provided the result is capable of being ascertained by calculation.

5. SAME—*when it is error to exclude warrants from the evidence.* Where the employees of a city treasurer's office, following the established custom prevailing in the office under previous administrations of other city treasurers, pay warrants in advance of their approval and allowance by the comptroller and city council, it is error, in a prosecution of the city treasurer for withholding city funds from his successor with criminal intent, to exclude from evidence such of the warrants as are not shown by direct evidence to have been paid to the persons named therein.

6. SAME—*when a motion to impound documents and permit an investigation should be allowed.* In the prosecution of a city treasurer for withholding funds from his successor with criminal intent, a motion to impound the books and documents in the possession of the prosecution and permit an examination thereof by the accused before the trial should be allowed, where it appears that such an examination is necessary to give the defendant time to investigate the charges and procure the attendance of the necessary witnesses.

7. *SAME—when motion for bill of particulars should be allowed.* While the allowance of a motion for a bill of particulars rests within the sound discretion of the court, yet it should be allowed where the charge is so general that the accused cannot properly prepare his defense without a more specific statement of the charge.

8. *SAME—rule as to allowing a private attorney to assist the State's attorney.* Whether private attorneys shall be allowed to assist the State's attorney in prosecuting a criminal case rests largely in the discretion of the court under the particular facts and circumstances of the case, but it is the duty of the court to prevent oppression of the accused and permit only such assistance as justice and fairness may require.

9. *SAME—when it is error to allow private attorney to conduct prosecution.* It is reversible error to allow a private attorney to practically conduct the prosecution of a city treasurer, where such attorney has been in the employ of the accused as his adviser during the administration of the accused, in matters closely related to and interwoven with the subject matter of the prosecution.

10. *SAME—an attorney in the case is not disqualified to testify.* The fact that a witness is employed as an attorney in the case does not preclude his testifying but only affects the question of the credibility of his testimony.

11. *SAME—a client may waive privilege against disclosures by attorney.* A client may waive the privilege against disclosure by his attorney of confidential matters, and does so when he voluntarily testifies thereto himself; but the waiver extends no further than the subject matter concerning which the client testifies.

12. *SAME—statute requiring demand to turn over funds should be reasonably construed.* While section 215 of the Criminal Code requires a demand upon a public officer to turn over funds to his successor, except under the circumstances coming within the proviso, yet the statute must be given a reasonable and practical construction as to what constitutes such demand.

13. *SAME—instruction should not authorize jury to treat testimony of accused different from that of other witnesses.* An instruction is objectionable which is so worded as to lead the jury to believe they may treat the testimony of the accused different from the testimony of other witnesses.

14. *SAME—when testimony of accused cannot be disregarded.* The right of the jury to disregard the uncorroborated testimony of the accused or any other witness is limited to cases where they believe, from the evidence, that the witness has willfully testified falsely to a matter material to the issues being tried.

15. SAME—*when instruction on the presumption of innocence should be qualified.* An instruction stating, in effect, that the rule which clothes every person with the presumption of innocence and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt is not intended to aid anyone to escape who is, in fact, guilty of crime, should be qualified with the statement that such rule is a humane provision intended to prevent any innocent person from being unjustly punished.

WRIT OF ERROR to the City Court of East St. Louis;  
the Hon. BENJAMIN W. POPE, Judge, presiding.

D. J. SULLIVAN, and H. E. SCHAUMLIEFFEL, for plaintiff in error.

P. J. LUCEY, Attorney General, CHARLES WEBB, State's Attorney, and GEORGE P. RAMSEY, (A. B. DAVIS, of counsel,) for the People.

Mr. JUSTICE CARTER delivered the opinion of the court:

Plaintiff in error, Edward Gerold, was indicted at the September term, 1913, of the city court of East St. Louis for withholding, as city treasurer, the funds of said city, in violation of the provisions of section 215 of the Criminal Code. (Hurd's Stat. 1913, p. 848.) At a trial had at the March, 1914, term of that court the jury returned a verdict of guilty. At the May term judgment was rendered on said verdict and plaintiff in error sentenced to the penitentiary. This writ of error was then sued out.

In November, 1913, the plaintiff in error moved for a change of venue from the two judges of said city court, Vandeventer and Flannigan. The court denied the motion but called in Judge Benjamin Pope, of the city court of DuQuoin, Illinois, before whom the case was tried. It is urged by counsel for plaintiff in error that the trial of the case by Judge Pope was error; that the change of venue should have been granted under the affidavit from the two judges of said city court, and that that court was without

authority to call in Judge Pope. It was not urged below, and is not here, that Judge Pope was in any way prejudiced against plaintiff in error. Under the statute as to change of venue in civil cases, which is practically identical with the statute here invoked, this court has several times held that the party applying for a change of venue for prejudice of the judge obtained all the relief to which he was entitled when another judge,—one who had no interest in the proceeding,—was called in to try the case. (*Gregory Printing Co. v. DeVoney*, 257 Ill. 399, and cases cited.) Counsel concede that this is the rule laid down in civil cases, but insist that the statute should be differently construed as to criminal cases. We see no reason why any such distinction should be made in construing the same words in the criminal and civil statutes. The purpose in both cases is to secure a trial before a judge who is unprejudiced. If the object can be as well attained by not sending the case to another county as by doing so, the expense of the transfer should be avoided. Change of venue statutes should receive a reasonable construction,—one that will promote the ends of justice and carry out the purpose of the statute. *Chicago, Burlington and Quincy Railroad Co. v. Perkins*, 125 Ill. 127.

Counsel further argue, however, in this connection, that the refusal to send the case for trial to another county prejudiced plaintiff in error, as the people of East St. Louis were so aroused over the prosecution of this and other cases in which there appear to have been other indictments returned about the same time, that plaintiff in error could not receive a fair trial. The statute for change of venue on account of the prejudice of the judge was not enacted for the purpose of allowing a change of venue from the county on account of the prejudice of the inhabitants. There is another section of the statute on change of venue that covers that class of cases. We do not see how plain-



tiff in error was prejudiced by the calling in of Judge Pope to try this case.

The indictment consisted of five counts, each charging plaintiff in error, in substantially the same language, with the offense of withholding from Frank Keating, his successor in the office of city treasurer, money, coupons, bonds, bank checks, notes and other funds and securities belonging to the city of East St. Louis, of the value of \$50,000. Before the trial of the case plaintiff in error presented a motion to the court, supported by an affidavit, setting out that it was wholly impossible for him to determine from said indictment in what particulars he was claimed to be in default and asking for a rule on the prosecution to file a bill of particulars. This motion was allowed, and shortly thereafter the State's attorney filed a bill of particulars, consisting of thirty-three counts or items. Thereupon the plaintiff in error presented to the court a motion for a rule on the prosecution to make the charges under count or item 30 more specific, on the ground that it was in such general terms as to afford but little, if any, information as to the nature of the charges contained therein. In the same motion plaintiff in error asked the court to impound the records and documents to be used on the trial so they could be inspected by him, urging in support of this motion that the State's attorney had taken into his possession many of the instruments, writings and public files belonging to the office of the city comptroller and the office of city treasurer, which would be relied on in the trial in support of the various counts in the bills of particulars; that he had refused to permit plaintiff in error to see them, and that in order to make a proper preparation of his defense it was necessary for him to see these various public documents; that he would not have the necessary time or opportunity during the actual trial of the case. The court overruled the motion and refused to require the State to make item 30 more specific, and refused to impound the

documents or to compel the State's attorney to allow plaintiff in error to examine them at that time.

After the jury was selected, plaintiff in error, by his attorneys, objected to the appearance of Thomas M. Webb as an attorney for the prosecution in the case, for the reason that for several years last past he had been the plaintiff in error's attorney and as such attorney had discussed in confidence the various items or charges involved in the indictment, setting out in some detail in what respect said Thomas M. Webb had advised with him on matters involved in the prosecution of this cause. The trial judge overruled this motion, giving as the reason that said Webb was an officer of the court and an attorney of experience and that he did not believe said attorney would do anything not becoming or befitting such officer. Thereafter Thomas M. Webb filed an affidavit giving his version of his relations, as an attorney, with plaintiff in error. It is most earnestly argued by counsel that the trial court erred in overruling these motions. We shall consider these questions later, as they can be better discussed after the facts have been stated.

At the time of the trial plaintiff in error was thirty-four years of age. He took office as treasurer of the city of East St. Louis in May, 1911, for the term of two years, serving as such treasurer for that term and giving bond as required by law. Prior to his election he had assisted his father in conducting a moving and storage business. His reputation appears to have been excellent. He had gone through the grammar grades of the public schools but had not attended high school. He had no knowledge whatever of book-keeping and knew nothing of the duties of the office of treasurer. After his election he placed in charge of the office an elderly gentleman, William H. Matlack, who had been in the treasurer's office in the same capacity during the administration of Neims, who was the predecessor of Gerold's predecessor, Holten. Matlack, from the

record, appears to have been quite familiar with the duties of the treasurer's office and the manner in which its business had been conducted. His competency or honesty was not questioned by either party at the trial. During the administration of the office under plaintiff in error, it seems to be conceded, the business was conducted under the same general system as it had been during the previous administrations, the same books being used and the same safeguards adopted to protect the interests of the public. It would be more accurate, perhaps, to say the same lack of safeguards, for the book-keeping and management of the office under plaintiff in error's administration, as well as several previous administrations, were without question extremely defective. Near the expiration of the plaintiff in error's term of office an expert accountant, Harry G. Ambrose, from St. Louis, was employed by the city council of East St. Louis to examine and audit the books of the various offices, and such irregularities were discovered in the books of the treasurer's office that this indictment resulted. It seems to be conceded, also, that as a result of the same examination other indictments were returned by the same grand jury against other officials or employees of the city. During the term of office of plaintiff in error, and apparently for several years previous, the city of East St. Louis had been making a large number of local improvements, such as building sewers and paving streets and sidewalks, for most of which bonds, with interest coupons attached, had been issued for deferred payments. Many of these bonds and coupons were coming due during the two years plaintiff in error was in office. Claims in great numbers were also presented for payment every month to meet the expenses of the various departments of the municipality, including labor and contracts. The testimony shows that the moneys received by the city from various sources were frequently insufficient to meet its claims, and often certain claims were not paid for several months after being pre-

sented. It is obvious from the testimony that the city had never established a proper system of book-keeping as to the moneys received and paid out. The system of keeping books in all these various departments was so loose as to furnish little or no check by one department upon another, and it is apparent from all the testimony in this record that it was impracticable to check up with certainty or accuracy in any one of the departments what had been done by that department as to any given fund. No attempt was made by plaintiff in error or the city treasurers who had preceded him to keep the various funds separate, as the statute contemplates. The funds applying to the special improvements were kept with the general funds of the city, and frequently such funds seem to have been used indiscriminately. The proof shows that several years before this trial the city council of said city established the office of comptroller, giving him such power as is provided by statute for such official and also certain other duties imposed by ordinance. The statute provides that that officer shall have entire supervision of the finances of the city and the manner in which its money affairs shall be handled. Before plaintiff in error was elected to office, and during his term, under the system established, presumably by the direction of the comptroller's office, municipal bonds and coupons were prepared and issued by that office, and when presented for payment were audited, taken up and became files of that office. All claims for money were required to be presented to the comptroller and approved by him, as well as by the city council, before they were paid. If a claim had not been paid the warrant was issued to the one in whose favor the claim had been allowed. Claims were not allowed by the council, as a rule, oftener than once a month,—sometimes not for several months. Under a practice that had been in vogue for years with the municipal authorities, a creditor usually was not required to wait until his claim was passed upon by the council or the comp-

troller. If it appeared regular and meritorious on its face it would be paid by the treasurer's office when presented, and the treasurer would afterward get a warrant from the comptroller for the amount after the claim had been allowed and audited. On the receipt of such a warrant the treasurer's books would then be credited with the amount thereof. When coupon interest or principal bonds against the city fell due, it had been the practice of the city treasurer's office, with the sanction of all the other city departments, to take up these matured bonds and coupons as they were presented to the treasurer, paying cash therefor, before they had been audited by the comptroller or allowed by the council. These bonds or coupons would then be placed by the treasurer in a box, which is designated in the testimony as the "strong box," of that office. No record of any kind would be made in the treasurer's office of these transactions. From day to day, as the bonds were paid, they were placed in this strong box. Claims for labor or other running expenses were usually paid in a similar manner. When paid before allowed, an assignment by the claimant of the claim, in the form of an order on the treasurer for a warrant in favor of himself, would be taken by the city treasurer and placed in the strong box as a receipt for the money thus paid out. These various bonds, interest coupons and claims paid by the treasurer during the month and kept in the strong box might frequently amount to many thousands of dollars. Usually at the end of the month the treasurer would take this box and empty out its contents and make out statements of the claims, which were designated as vouchers. These vouchers, together with the instruments that had been paid by him, including bonds, coupons or claims, would be taken to the comptroller's office. If found correct on checking up they would be approved by the comptroller and taken before a committee of the city council, and if they were there approved would be endorsed by the chairman of the committee and pre-

sented to the council, and when allowed the city clerk would make an entry showing such allowance and thereafter the comptroller would issue a separate warrant on each of these vouchers. The city comptroller thereupon would deliver such warrants to the city treasurer. The treasurer's office would then make an entry upon its books showing these claims, bonds and coupons paid and take credit for them, which would be the first time that an entry was made in the books in the treasurer's office in a transaction of this kind. These claims were frequently paid by check signed by the city treasurer, but the evidence shows it was not the practice always to enter upon the stub of the check for what claim or in whose favor the check was drawn. The only protection that the treasurer had between the time he paid this claim, bond or coupon and the issuing of the warrant to him, was the instrument which he placed in his so-called "strong box." The evidence shows that under the administration of Frank Holten, the city treasurer who had preceded plaintiff in error, when bonds and interest coupons were paid they were not marked paid or in any other way showing they had been canceled. These bonds and coupons were payable to bearer and were therefore negotiable. When presented at the treasurer's office they were paid without question if they appeared regular on their face. The evidence discloses that at one time during the two years that plaintiff in error was treasurer a large number of these bonds and coupons issued in connection with various street improvements of the city were found on a table in a small room on the third floor of the city hall,—a room not in any way connected with the office of city treasurer or comptroller. When found they were covered with dust, indicating that they had been there for some time. They were not marked paid or canceled in any manner. The evidence tends to show that these bonds and coupons were actually paid during Holten's term of office. In amount they aggregated about \$500,000. They were

not under lock and key and do not appear to have been in anyone's care. All bonds and coupons paid during plaintiff in error's administration were stamped with a perforating stamp at the time they were delivered to the comptroller. Some of these bonds and coupons presented by plaintiff in error to the comptroller, the prosecution insist in this case, had been previously paid by treasurer Holten but not at that time canceled or marked paid. One of the principal charges against plaintiff in error is that he wrongfully and with criminal intent took credit for paying these bonds and coupons the second time, after they had been taken up by his predecessor in office.

The first twenty-seven counts or items, except item 11, of the bill of particulars, consisted of charges that plaintiff in error had taken credit for paying bonds and coupons that had been paid previously by the city, upon the pretense that they had been paid during his administration, the same being done wrongfully and with criminal intent. These twenty-six counts or items each set forth a certain amount of money that it was charged had thus been pretended to have been paid out for coupons or bonds by Gerold during his two year term of office. The amounts charged in these various counts or items vary in amount from \$25 to \$6800, making a total of \$18,520.60.

Counsel for plaintiff in error insist that the proof in the record did not justify his conviction under any one of these twenty-six counts. They also argue that the court improperly permitted the expert accountant employed by the city to give his conclusions showing that the coupons or bonds in each one of these counts, after having been paid by the former city treasurer, were shown by Gerold's books to have been paid by him when they were not, in fact, so paid by him, arguing that the expert gave in his testimony no proper basis for his conclusions before he was allowed to give them. The testimony of various city officials, including the comptroller and employees in his and the city

treasurer's office and others, is found in the record as to many of these items. We understand it is practically conceded by counsel for the State that as to most, if not all, of these items the proof would not be sufficient to justify the conviction of plaintiff in error without the testimony of the expert accountant, Ambrose. This expert, while on the witness stand, stated his method of reporting his conclusions from the books of the city that he had access to, as follows:

"A complete statement, so far as the history of every one of these improvements and as to the results of the accounts is concerned, was prepared from that examination from bonds, coupons, warrants and from entries in every cash book covering a period of five years, and every entry in every ledger covering that period was examined. Every coupon was applied to the vouchers that existed, and those for which the vouchers were missing were applied by finding the amounts of them corresponding to the amount required to balance certain vouchers. The bonds and coupons are now on file in the comptroller's office, and it would only have encumbered the evidence to try to show them. I may state that the audit of bonds and coupons was based on the total amount of bonds authorized, which also showed payments of coupons that were legitimately issued. We also took into account the cash account that showed balances of unissued bonds. At that time we knew the amounts of all bonds issued, the amounts unissued, the amounts redeemed and the amounts outstanding, and we had the same information in respect to coupons, and the result of our examination was that amounts had been paid in excess of the amounts issued and showed as redeemed."

The testimony shows that several of the books kept by the comptroller in which entries were made with reference to some of these bonds and interest coupons were lost or stolen out of the office before the time of this trial but does not tend to show who was responsible for these books



being lost or stolen. It seems to be assumed by counsel that they were stolen. Expert Ambrose was cross-examined at length as to why he testified that the bonds or coupons in each of the twenty-six counts or items had been illegally pretended to have been paid a second time by Gerold, and gave various and different reasons as to his conclusions under the different counts or items.

Where the originals consist of numerous documents, books, papers or records which cannot conveniently be examined in court and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any competent person who has examined the documents, provided the result is capable of being ascertained by calculation. (*Reinke v. Sanitary District*, 260 Ill. 380; *Welsh v. Shumway*, 232 id. 54; *Jones on Evidence*,—2d ed.—sec. 206; 2 *Wigmore on Evidence*, sec. 1230; 1 *Greenleaf on Evidence*,—*Lewis' ed.*—sec. 93; 2 *Ency. of Evidence*, 690; *Underhill on Evidence*, sec. 37; 17 *Cyc.* 511; *Hollingsworth v. State*, 111 Ind. 289; *Burton v. Driggs*, 20 Wall. 125.) In many instances any other method would cause a great loss of time and tend to confuse the jury. In a trial involving so many details and occupying as much time as the case under consideration, expert testimony as to what was shown by an examination of the books, accounts and records was the only mode of presenting an intelligent view of the case to the jury. The court, of course, might have required the production of the original books, so far as they were accessible. Counsel for the plaintiff in error do not object on the ground that they were not permitted to cross-examine expert Ambrose fully as to the basis of his conclusions. Their principal objection is that the expert should not have been permitted to testify to his conclusions. Without discussing at length the various objections raised by counsel for plaintiff in error as to the admissibility of Ambrose's testimony, we deem it sufficient to say that we

find no reversible error in the various rulings of the trial court on this particular subject. The weight of the testimony of this expert, as well as other testimony introduced by the State for the purpose of supporting the allegations under these twenty-six separate counts or items, was a question for the jury.

Count or item 11 of the bill of particulars charges the plaintiff in error with wrongfully withholding \$1500 on account of the improvement of Missouri avenue, in said city. Some time in the early part of the year 1913, while Gerold was still city treasurer, a discrepancy was discovered in the treasurer's books by someone connected with that office. After various city officials were consulted,—among others plaintiff in error,—Saunders, an accountant and book-keeper, was employed to find the error. The discrepancy amounted to something over \$1600. In making the investigation Saunders found in the comptroller's office three bonds of \$500 each, numbered, respectively, 25, 42 and 62, for an improvement on Missouri avenue. These bonds were not marked canceled, but were found with certain other bonds on that improvement which the testimony shows had been paid and canceled under Gerold's administration of the treasurer's office. These three bonds accounted, if they had been paid during Gerold's term of office, for the greater portion of the discrepancy, and Saunders did not find from an examination of the records that they had been paid previous to the time Gerold was city treasurer. After consulting with various officials he concluded that these three bonds had been paid the same time as the others but that the treasurer's office had failed to cancel and take credit for them on the books. They were therefore then placed to the credit of treasurer Gerold's account. Afterward, expert Ambrose, in examining the books, found, as he testified, that these three bonds had been previously paid under treasurer Holten's administration. He talked with Gerold about it, and the latter stated

that he would look into the matter, and if he found Ambrose was correct he would assume the responsibility and refund the amount that had been credited to him. He did so refund it. Counsel for the plaintiff in error argue that because these bonds, which were introduced in evidence, showed that none of them were due until during Gerold's administration as city treasurer, expert Ambrose is certainly mistaken in saying they had been paid during Holten's administration, and that in any event it is clear that it was an error of book-keeping, if error at all, and not an intentional criminal violation by Gerold of the statute upon which this indictment was based. With this we agree. We do not think the evidence on this count of the bill of particulars was sufficient to sustain the conviction.

Under count or item 28 plaintiff in error is charged with withholding \$1000 on the pretense that it was paid out in satisfaction of a judgment in the case of *Short v. City of East St. Louis*, (Short suing in the capacity of administrator,) which had been rendered in the circuit court of St. Clair county, Illinois. The judgment in question, as originally entered, was \$5700. Payments were made by the city reducing the judgment to \$4700. During the spring of 1913, while Gerold was still city treasurer, the administrator in question procured a certified copy of the judgment from the circuit court showing the amount thereof and the amount that was still due thereon and took this transcript to the city comptroller's office, where that official prepared a voucher, to which the transcript was attached. The voucher and transcript could not be found at the time of the trial. When these documents were presented to the council they allowed the judgment for \$5700 instead of for the balance then due, the total amount allowed being \$5729.23 in place of \$4729.23. A brother of the administrator took this claim, as so allowed, to the city treasurer's office to get the money, and there called the attention of Matlack, the chief clerk, to the fact that it had been

allowed for \$1000 too much. Apparently Matlack had not noticed that the higher amount was incorrect until his attention was called to it, and he or the administrator's brother changed the figure "5" to "4." Matlack then gave the brother two checks, amounting to \$4729.23, and took an assignment authorizing the comptroller to issue a warrant in favor of the treasurer for the money. No entry was made of that part of this transaction at that time in the treasurer's book, and the assignment was taken in the usual form. By some oversight Matlack failed to make any note of the fact that the claim was allowed for \$1000 in excess of the correct amount. Some time afterward the warrant for this claim was sent over by the comptroller's office to the treasurer's office, with other warrants, and the bookkeeper in the treasurer's office then gave the treasurer credit on the books for this warrant for \$5729.23, which was \$1000 more than should have been credited. There is not the slightest evidence to show that plaintiff in error personally had, up to this time, any part in this transaction. As we understand this record, he had no knowledge on this question until after this indictment was brought. We are of the opinion that the State was not aware of this mistake until after the indictment was brought and the expert accountant had figured out the shortage on this point. The plaintiff in error himself testified that he knew nothing about it until two or three weeks before he was on the witness stand in this case, and that he had paid the amount over to his successor in office as soon thereafter as he could arrange with him to receive such payment. We do not think the evidence in this record tends to show that plaintiff in error was guilty, under the statute, of criminally withholding this \$1000. All the transactions in the treasurer's office during his administration with reference to the Short judgment were looked after by employees in the office,—mainly by his chief assistant, Matlack. Counsel for the People state in their brief and argument that there is

nothing in the record showing that Matlack was not a competent and honest man. If that statement be correct,—and we think it is,—we cannot see how it can be argued with any reason, as Matlack was responsible for the \$1000 mistake as to the Short matter, that plaintiff in error is criminally liable, under the statute, for withholding that amount.

This conclusion renders it unnecessary for us to consider the other questions raised by counsel for plaintiff in error as to count or item 28 in the bill of particulars. No proof was offered under counts or items 29, 31, 32 and 33 of the bill of particulars.

The only item or count remaining for our consideration is number 30, under which it was charged that plaintiff in error withheld \$25,000 from the city of East St. Louis. As heretofore stated, the court refused to require the State to make this item more specific. Near the close of Gerold's term of office as city treasurer there was made out by the employees in his office a report or statement showing various things with reference to the office, among others, that he had on hand cash amounting to \$137,471.27. This report was substantially the only thing introduced in chief by the People to show that Gerold had kept back and refused to turn over \$25,000 in money belonging to the city, as alleged in said count 30. On the day that Keating, the successor of Gerold, went into the office of city treasurer the plaintiff in error undertook to turn over this amount, \$137,471.27, that he had belonging to the city. This money had all been kept in one fund by the treasurer, except the fund as to one special assessment improvement, amounting to \$114,224.62. The evidence tends strongly to show that not only during Gerold's administration, but also during several preceding administrations in the city treasurer's office, the moneys as to these special assessment improvements and other funds had not been kept separate; that when plaintiff in error went into office Matlack and his assistants found the funds mixed in the same way. The evi-

dence shows, without contradiction, as we understand the record, that at the time Gerold went into the office he received from his predecessor, Holten, \$120,000 in bulk, chiefly coupons and orders for warrants, the books not indicating the separate funds to which it should be applied. Gerold's successor, Keating, when he went into office, on the advice of his attorney, Dan McGlynn, refused to accept all the funds as they were offered to be turned over to him. He accepted the \$114,224.62 that was in a separate fund but refused to accept the balance of the \$137,471.27,—that is, \$23,246.65. Several meetings were held between Keating and his attorney, McGlynn, on one side, and Gerold and his attorney, Thomas M. Webb, on the other, to discuss this question of a separation of funds. Gerold, or his attorney for him, claimed that they could not separate this balance, as the funds had never been kept separate on the books and any separation would be purely arbitrary. Keating, or his attorney for him, refused to accept such balance unless so divided. Included in this balance, and claimed by plaintiff in error as a part of it, to be considered as cash, were orders for warrants on the city in his favor amounting to \$6360.20. These orders had been taken by employees in the city treasurer's office,—most, if not all, of them during the last month that Gerold was city treasurer,—when his office paid out money, from time to time, to various people by cash or check for labor and services, under contract or otherwise, and possibly in some instances for materials furnished the city. The evidence shows that some of these claims had been presented by the comptroller to the city council before Gerold was out of office and the remainder afterward, and that all of them were allowed by the city council as just claims. Warrants were issued by the comptroller to the treasurer for all of these claims, some immediately before and some immediately after plaintiff in error went out of office, and it appears they would have been paid had there been suf-

ficient money on hand at the time to pay them. Afterward plaintiff in error was asked to return the warrants and told that the new city administration, through its comptroller, would issue in their place anticipation warrants against the appropriation of taxes that had then been made. This was done and anticipation warrants were issued, but before they were delivered to plaintiff in error the matter was being investigated by the grand jury, and these anticipation warrants remained in the comptroller's office and were shown to be there at the time of the trial.

We find nothing in the record to indicate that the new treasurer, Keating, or his attorney, made serious objection to receiving this sum of \$6360.20 in orders for warrants as cash at the time of the various conferences. The principal dispute was that the balance then on hand of \$23,246.65 (including said \$6360.20 in orders for warrants) was not separated so that it could be paid over in separate funds. Some time after he was out of office, before and during the time of the trial, as his attention was called to these three matters, plaintiff in error paid over to the fund that he held as city treasurer, the \$1000 incorrectly credited to him in the Short judgment matter, the \$1500 plus the interest of \$275 (or \$1775 in all) for the three Missouri avenue improvement bonds, and \$800 that had been appropriated by the city council while Gerold was in office as a part of an allowance to the city aldermen to attend a meeting of the municipal assembly at Buffalo. The amount allowed each alderman for expenses was \$200, and as four of them did not attend they did not draw this money. This \$800, through an error of book-keeping, was not shown as still belonging to the funds of the city in said city treasurer's report that we have referred to. As soon as plaintiff in error's attention was called to this he set that sum aside as belonging to the city treasurer. These three last named sums, amounting to \$3575, when added to the balance heretofore referred to of \$23,246.65, left a balance in Gerold's

hands of \$26,821.65, which he freely concedes belongs to the city. In this last named amount, of course, was included the \$6360.20 which he claimed should be considered as cash and was so considered in making up his final report. Including these added amounts, the actual cash, \$20,461.45, that he held was deposited in the bank. During the trial of this cause the new city treasurer, on the suggestion of one of his employees and apparently with the sanction of his attorney, divided arbitrarily this balance into separate funds and accepted from the plaintiff in error, in part payment of such balance, the \$20,461.45 cash held by him for that purpose, leaving in the hands of the plaintiff in error \$6360.20 in orders for warrants. This last named amount, therefore, was the only amount that was submitted to the jury in support of item or count 30 of the bill of particulars, which item set forth that plaintiff in error was keeping back \$25,000 of money belonging to the city, and counsel for the State concede that this is the only part of the \$25,000 that there is any proof in the record to support.

After these orders for warrants had been introduced in evidence, showing the amount of money paid out by the treasurer's office for which plaintiff in error claimed he was entitled to credit, on a motion made by the prosecution the court announced that it would exclude all these orders, excepting those where plaintiff in error could prove that the money had been actually paid to the parties named in the orders. The record shows that plaintiff in error did make proof as to nearly all of the orders, which varied all the way from \$2 to over \$1000. As to some, if not the great majority, of these claims we think the proof showed clearly that the money had been paid to the persons who signed the orders, and, so far as the record discloses, the payments were legitimate. The court, however, held, as we understand, that as to four of these orders, amounting, respectively, to \$87, \$84.50, \$64 and \$109.95, (two of the four being signed by one person and the other two by two



different persons,) as there was no proof presented to the court that these men had actually received the money, he would not allow those four amounts to be considered by the jury as equivalent to cash on hand, as shown by Gerold's final report when his term as city treasurer expired. The State, in rebuttal, also introduced evidence which it is claimed tended to show that some of these other orders for warrants were not based on actual or legitimate service furnished to the city by the parties in question.

The evidence shows, without contradiction, that during the entire term of plaintiff in error as city treasurer, as well as during the administration of several previous city treasurers, the custom had prevailed of paying cash for orders for warrants in a manner similar to that which the testimony shows the treasurer's office followed in paying money for these orders for warrants, amounting to \$6360.20 during the last few weeks of plaintiff in error's term as city treasurer; that until the warrants were cashed the city treasurer's office, during all those years, had treated the said orders for warrants as cash in the conduct of the office. In view of the testimony in this record the court should not have ruled, as it did, that the plaintiff in error should not be entitled to credit as the equivalent of cash for any of these vouchers or orders for warrants that had been assigned to him, unless it could positively be proven that the money had actually been paid to the party named in the order. The evidence shows, without contradiction, that plaintiff in error himself attended to very little of the business of the office; that in most, if not all, of these cases the money was paid by his chief clerk, Matlack, or some other employee in the office. He himself does not remember that he paid the money for any of these vouchers or orders for warrants included in the \$6360.20, and there is no proof in the record that he did. The court should have permitted the testimony of plaintiff in error to remain before the jury, to be considered by them and be

given such weight as they thought proper, in the light of all the testimony in the record. If the State could introduce evidence tending to show that any of these vouchers or orders for warrants had been forged, and that plaintiff in error, as city treasurer, had not actually paid the money for any of them, such evidence would have been proper to be submitted to the jury for their consideration on that subject, but evidence that only tended to prove that while an employee or contractor had done the work, through collusion with some city official he had not done good work, should not have been admitted to prove plaintiff in error guilty, under the statute, if he actually paid, as treasurer, to the persons who did the work, money for such vouchers or orders. The trial judge evidently understood this to be the law, as he gave instructions to the jury to that effect. If the only question involved in this record were the rulings as to the admission or exclusion of evidence with reference to the orders for warrants for the \$6360.20, our conclusion would be that no serious error was committed by the trial court in this regard, except as to the ruling in excluding the vouchers or orders for warrants where it was not proved by direct evidence that the money had been actually received by the parties therein named.

Some other questions are closely involved with the question just considered, in deciding whether or not there is any proof justifying the jury in finding plaintiff in error guilty under count 30. One of these is whether the court should have impounded the public documents that were held by the State's attorney and should have granted the motion of plaintiff in error to permit him and his counsel to examine such documents before they were actually introduced in evidence. That motion stated that the reason why he wished this was because the accounts upon which these charges were made were complicated and would require investigation, and that the plaintiff in error would not have an opportunity of properly investigating all these matters

if he had to wait until they were introduced in evidence. It is stated by counsel for plaintiff in error,—and the evidence in the record tends to show that it is true as to some, at least, of these orders for warrants included in the disputed amount,—that the persons who signed the orders or made the assignments to the plaintiff in error could not be found because of lack of time. Had the plaintiff in error had an opportunity of examining, under proper conditions, these various documents, it is possible that he could have obtained positive evidence as to the payment of the money to the proper persons. The whole theory of our law as to the trial of one accused of crime is to give him an opportunity to know the charges against him, so that he can make proper investigation and preparation for the trial. We see no reason why the motion of plaintiff in error on this point should not have been granted by the trial court.

Very closely related to this last question is the one whether the court committed error in not requiring the State to specify more particularly under said count 30 upon what charges that count was based. The count reads:

“The withholding of twenty-five thousand (\$25,000) dollars of the money of the city of East St. Louis, which the defendant received as treasurer of the said city during his term of office, commencing May 5, 1911, and ending May 5, 1913, and the said sum of twenty-five thousand (\$25,000) dollars is separate and distinct from each and all of the items above specified and is composed of various items or sums, the origin and character of which is unknown to the People, the plaintiff in said cause.”

It would be difficult to imagine a charge more general in its nature. It is only limited in the respect that it says this amount is distinct from each and every other item specified in the counts. It requires no argument to show that a conviction under this count would be impossible if the proof was as general as the count. The record shows conclusively that the State knew, at the time the motion

was made to make this count more specific, that they were relying at least upon the fact that the report heretofore referred to showed that plaintiff in error had on hand, in cash, \$137,471.27 and that he had only turned over \$114,224.62. The prosecuting officer must have known that the orders or vouchers for \$6360.20 constituted the chief part of this charge, for it is clear from this record that the newly elected city treasurer, and his attorney, Dan McGlynn, and also Thomas M. Webb, who was assisting in the prosecution at the time this motion was made, knew that plaintiff in error had on hand, in cash, all of the balance except that made up of orders for warrants, subject to be turned over to the new city treasurer, and that the dispute about that amount was only that it was not divided into separate funds. That information could readily have been included, thus giving a far more specific statement as to the basis of this count than was furnished by the wording as it stood. The requiring of a bill of particulars is within the sound discretion of the court. It is only required when the defendant cannot properly prepare his defense without such bill. (*Kelly v. People*, 192 Ill. 119; *People v. Nall*, 242 id. 284; *People v. Poindexter*, 243 id. 68.) On this record we can reach no other conclusion than that on this count, with the indefinite wording that it contained, plaintiff in error was not given a fair and reasonable opportunity to prepare for his trial. (See *Goodhue v. People*, 94 Ill. 37.) The rulings of the court in refusing to allow the motion of the plaintiff in error to make the charges in said count 30 more specific, and in not impounding the public documents in the hands of the State's attorney and permitting plaintiff in error and his counsel to examine them under proper restrictions, constituted reversible error.

Counsel for plaintiff in error further urge in this connection that the court improperly permitted Thomas M. Webb to appear as counsel for the People in this case when

he had previously acted as an attorney for plaintiff in error in matters which afterward formed the basis of this indictment and the prosecution thereunder. At the opening of the trial of this cause in support of his motion the plaintiff in error filed his affidavit, in which he set out, among other things, that said Webb had been for several years his attorney and had discussed in confidence with him the various items or charges involved in the indictment in this case; that since the indictment Webb had informed him he was going to assist in the prosecution of other indictments but would not assist in this against plaintiff in error; that Webb thereby succeeded in having affiant discuss with him the various items or charges involved herein, promising affiant that he would give him substantial advice and assistance in the trial of this case but that he could not act as attorney for affiant in the trial because his brother, Charles Webb, was State's attorney; that said Webb was at the time of the motion representing affiant in a civil suit on his bond now pending in the circuit court of that county, which covered many of the items involved in the bill of particulars herein; that those items had been discussed between them, both before and since the finding of this indictment; that affiant relied on Webb's promise that he would not appear for the prosecution; that in discussing the turning over of the office to his successor in office said Webb had acted as affiant's adviser and attorney, and prepared a resolution, which was passed by the city council, requesting Keating, plaintiff in error's successor, to accept said money as tendered without its being apportioned in funds; that the said Webb had continued to advise affiant that there was nothing affiant could do but to withhold the payment of the money until his successor in office would accept it; that at a former term of the court, when a bill of particulars was demanded of the State's attorney in this and other cases, said Webb made an argument against the motion, and when plaintiff in error

asked him why he did so, Webb stated that it was an immaterial matter and that the question involved applied to other bills of particulars in other cases and that he (Webb) would not assist in the prosecution of this case, and that said Webb afterward continued to advise and discuss with affiant as his confidential adviser and attorney.

This affidavit was sworn to March 7, 1914. The next day said Thomas M. Webb swore to an affidavit which was filed herein, and in which he stated that for some years prior to this indictment he had represented the Gerold Storage, Packing and Moving Company and plaintiff in error in various civil matters; that before and after the indictment affiant told Gerold that he had promised his brother, Charles Webb, State's attorney of the said county, that he would not accept the defense of any person charged with crime during said brother's term of office; that it was not true that he had discussed in confidence with said Gerold the items or charges involved in this indictment; that prior to said indictment he prepared for Gerold a resolution, the gist of which was that it was the sense and wish of the city council that Keating, Gerold's successor in office, accept from him a certain statement of the condition of the various funds then in his hands as ex-treasurer and that said Keating receipt for such funds received; that he had no recollection of appearing before the city council with reference to said resolution; that since the indictment he had not had anything to do with that resolution or any matter pertaining thereto; that prior to this indictment he had appeared, together with attorney Dan McGlynn, for Gerold in an action of debt brought by the city of East St. Louis against Gerold and had filed a certain plea therein; that this suit involved a certain amount of money which the city claimed that Gerold retained over and above his legal commissions as collector of taxes, and that the question of the criminal liability of Gerold was never discussed between them; that since the filing of said plea in said suit

affiant had not advised with Gerold, except on one occasion as to the filing of certain special pleas; that at no time did he ever discuss the matters involved in said suit from a criminal standpoint; that it was not true that he told Gerold that he would not assist in the prosecution; that, on the contrary, he told Gerold he would appear for the prosecution, and that Gerold should not disclose or discuss any matter pertaining to his defense, and that it was not true that he had continued to advise with Gerold concerning the withholding of funds from his successor in office; that Gerold stated that it would be impossible for him to render a statement to his successor showing, in detail, the particular funds, and thereupon affiant advised Gerold that in such case it would be best to procure the acceptance by his successor of whatever money he had in his hands belonging to the city, and that all such advice was with reference to Gerold's civil liability and had no reference to any criminal liability; that it was not true that he has discussed with Gerold the items involved in the bill of particulars filed in this cause; that affiant did not learn from said Gerold any fact or facts in a confidential or any other way that would hinder or delay Gerold's defense or aid the prosecution; that it was not true that he promised Gerold that he would give him substantial advice and assistance in the trial of this case.

Plaintiff in error in his defense testified at some length on this question: He re-affirmed on the witness stand the chief facts set forth in his affidavit just referred to. He testified, also, that said Thomas M. Webb was his confidential adviser and attorney when he was elected to office and arranged the adjustment between him and his predecessor when the plaintiff in error took over, as treasurer, the cash from his predecessor, including over \$120,000 of orders for which his predecessor had paid cash but had not received warrants or credit on the books of the treasurer; that these orders or warrants were of the same character

as those for the \$6360.20 involved in this proceeding; that when his office was being investigated by the expert, Ambrose, Webb was plaintiff in error's adviser; that when it came to a settlement between plaintiff in error and his successor, said Webb advised plaintiff in error that his cash balance could not be divided and distributed into funds as his successor wished to have it, and told the successor's attorney that the money could not be so distributed; that said Webb was familiar with each of these warrants that the plaintiff in error had at the close of his administration, and that they had talked over these matters together with these orders on the table before them. In rebuttal for the State, Thomas M. Webb took the witness stand and testified substantially as set forth in his affidavit above referred to, testifying, among other things, that he had practiced law for over twenty years and had known plaintiff in error about ten years; denied that he was plaintiff in error's attorney when his predecessor, Holten, turned over his office, and that through his (Webb's) advice the plaintiff in error had accepted from said Holten \$120,000 in orders or coupons; testified that he never had any connection with the settlement between plaintiff in error and Holten and knew nothing about it; that he never heard anything about these vouchers for warrants until this trial began and never saw the said vouchers before they were brought into court in this case; that when he, as attorney for plaintiff in error, met with Keating and his attorney, Dan McGlynn, and talked about turning over the money then held by plaintiff in error, he (Webb) said to Keating and McGlynn that he thought this money could be separated into the various funds, and that thereafter, in discussing it when they were alone together, plaintiff in error told him that the money could not be separated into the various funds, and that he would not turn over any of the cash to his successor until Keating agreed to accept these orders as cash. McGlynn and Keating also testified in the case. It is apparent from



McGlynn's testimony, as well as that of plaintiff in error, that during these conferences McGlynn and Webb did a large part of the talking. Webb's testimony tends to show that plaintiff in error did as much talking as he (Webb). Keating testified that at their first conference Webb stated that he thought the money could be separated into the various funds. Webb, while on the witness stand, stated that he was only advising plaintiff in error during these conferences about turning over the cash and getting it accepted, as to the legal phases of the subject, and that the question of criminal responsibility of plaintiff in error was not considered or discussed in any manner.

When Thomas M. Webb took the witness stand counsel for plaintiff in error objected to his testifying unless he withdrew from the case as an attorney. The court refused to allow the motion, stating that he had no control over the matter. The record shows that Webb was practically in entire charge of the active prosecution of this case and all important witnesses appear to have been examined by him, except that when on the witness stand in rebuttal he was examined by another assistant. He also appears to have cross-examined practically all the witnesses for the defense. His brother, the State's attorney, so far as the record discloses, took little part in the trial below. No reason is given in the briefs, and we find none in the record, showing why the State's attorney himself did not prosecute this case or why Webb was employed to take charge of the prosecution. We can readily understand why the State's attorney of a large county such as St. Clair might not be able to give the necessary time to the preparation and the trial of such a complicated case as this, but we know of no reason why some member of the bar should not have been employed to assist who had not been the attorney and confidential adviser of plaintiff in error on any question that may be directly or indirectly involved in this hearing. This court has held that whether counsel should be em-

ployed to assist the State's attorney in the prosecution of a case rests largely in the sound discretion of the court, to be decided according to the special facts and situation in each case; that it is the duty of the court to prevent oppression of the accused and permit only such assistance as justice and fairness may require. *Hayner v. People*, 213 Ill. 142; *People v. Blevins*, 251 id. 381; *People v. Gray*, 251 id. 431; *People v. Donaldson*, 255 id. 19; see, also, *State v. Bartley*, 24 L. R. A. (N. S.) 564, and cases cited in note.

So far as we are advised this court has never been called upon in any criminal case to pass on a question similar to the one here involved, but the identical question has been passed upon many times in other jurisdictions, and in this and other courts the principle involved has received careful consideration. The rule has long been firmly established that an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties. When he has once been retained and received the confidence of a client he cannot enter the service of those whose interests are adverse to that of his client or take employment in matters so closely related to those of his client or former client as in effect to be a part thereof. (Weeks on Attorneys,—2d ed.—secs. 120, 271; 1 Thornton on Attorneys, sec. 174.) This rule is a rigid one, designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties. He should undertake no adverse employment, no matter how honest may be his motives and intentions. (*Strong v. International Investment Union*, 183 Ill. 97.) He owes to his client fidelity, secrecy, diligence and skill and cannot take a reward from the other side. He is not, as a general rule, allowed to divulge information and secrets imparted to him by his client or acquired during their professional relation unless authorized to do so by the

client himself. (*Hatch v. Fogerty*, 40 How. Pr. 492.) It is the glory of the legal profession that its fidelity to its clients can be depended upon; that a man may safely go to a lawyer and converse with him upon his rights in litigation with absolute assurance that that lawyer's tongue is tied from ever discussing it. (*United States v. Costen*, 38 Fed. Rep. 24.) This rule has been so strictly enforced that it has been held that an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general matter, even though while acting for his former client he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment. (*Pierce v. Palmer*, Ann. Cas. 1912b, (R. I.) 181, and cases cited in note.) If this is the rule in civil cases the law will not be less strict in criminal proceedings, especially as to the duty in this regard resting upon counsel for the State. Such an officer is acting in a quasi-judicial capacity, and he and those associated with him should represent public justice and stand indifferent as between the accused and any private interest. It is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his statutory or legal rights as it is to prosecute him for the crime with which he may be charged. (*State v. Osborne*, 20 Ann. Cas. [Ore.] 627.) The canons of ethics of the American Bar Association and various State associations in this country are in accord on this subject with the rule just stated. An attorney cannot be permitted to assist in the prosecution of a criminal case if by reason of his professional relations with the accused he has acquired a knowledge of the facts upon which the prosecution is predicated or which are closely interwoven therewith. (*Wilson v. State*, 16 Ind. 392; *Commonwealth v. Gibbs*, 4 Gray, 146.) The members of the profession must have the fullest confidence of their clients. If it may be abused the profession will suffer by the loss of the confidence of the people. The good

of the profession, as well as the safety of clients, demands the recognition and enforcement of these rules. (*State v. Halstead*, 73 Iowa, 376.) It is unnecessary that the prosecuting attorney be guilty of an attempt to betray confidence; it is enough if it places him in a position which leaves him open to such charge; and this disqualification may arise by reason of services rendered by him in a civil case as well as in a criminal case. (*State v. Rocker*, 130 Iowa, 239; 2 Thornton on Attorneys, secs. 693, 700.) The administration of the law should be free from all temptation and suspicion, so far as human agencies are capable of accomplishing that object, and public policy strongly demands that one who has been employed on one side should not be permitted to appear on the other side. It is not sufficient to say that the law will not permit him to disclose any fact which may have been communicated to him. "If he *knows* the vulnerable points in the case \* \* \* there are many ways by which those points might be made available \* \* \* besides disclosing them as a witness." (*Gaulden v. State*, 11 Ga. 47.) "The case might easily be put that a most honest man so changing his situation might communicate a fact appearing to him to have no connection with the case" and yet which might turn out to be the vital point therein. (*Cholmondeley v. Clinton*, 19 Ves. Jr. 260.) The authorities last cited also state that if an attorney knows anything prejudicial to a former client he ought not to accept employment against him where such prejudicial information can be used against him. Of course, it is no ground for preventing counsel from accepting employment in a case merely that he has knowledge of the facts involved therein. (*Commonwealth v. King*, 74 Mass. 501.) It is the obtaining of this knowledge from his client as his confidential adviser and attorney that precludes him from accepting such employment.

"Lest any temptation should exist to violate professional confidence or to make any improper use of the in-

formation which an attorney has acquired confidentially, as well as upon principles of public policy, he will not be permitted to be concerned on one side of the proceedings in which he was originally in a different interest, \* \* \* and though discharged many years ago and feeling himself free to swear that he had forgotten the nature and purport of the communications he had received from the former client and that they were not confidential, for the court can not investigate the plus or the minus of the confidence reposed in him without an absolute disclosure of the facts nor can it calculate how much of these confidential communications are still in the recollection of the attorney, but the mere circumstance of a retainer sufficiently implies the fact of confidential disclosure to whatever extent having been made." 1 Ferguson's Ir. Pr. 36, 37; *In re Cowdery*, 58 Am. Rep. 545; *Hatch v. Fogerty*, *supra*.

Considering only the affidavit and testimony of attorney Webb himself, the conclusion is inevitable that he was employed by Gerold in a matter that was very closely interwoven with and related to the same subject matter that formed a basis for this prosecution, if, indeed, it was not the same identical matter, and that this rule must be invoked against his employment in this cause. No matter if his intentions were of the best, he placed himself in a position to be open to the charge of betraying the professional confidence of his client. The law will not permit this. The trial court should have sustained the motion and refused to permit Webb to assist in the prosecution of this cause.

Counsel for plaintiff in error objected to attorney Webb testifying on the ground that he was disqualified because he was an attorney in the cause. This fact did not prevent him from testifying but only affected the weight that should be given to his testimony. Our views on the propriety of an attorney testifying under such circumstances have been repeatedly stated. *Wilkinson v. People*, 226 Ill.

135; *Fitzgerald v. Allen*, 240 id. 80; *Wetzel v. Firebaugh*, 251 id. 190; *Bailey v. Beall*, 251 id. 577, and cases cited.

Counsel in this court have raised an objection to attorney Webb testifying as to confidential communications which he had received from his client, Gerold. This objection does not appear to have been raised in the court below and therefore we need not consider it. Had it been, Gerold waived the point as to most, if not all, the testimony of Webb. While the general rule is that all confidential communications between attorney and client made because of their relationship and concerning the subject matter of the attorney's employment are privileged from disclosure, and counsel are not at liberty, even if they wish, to testify concerning them, (*People v. Barker*, 56 Ill. 299; *Thorpe v. Goewey*, 85 id. 611; 1 Greenleaf on Evidence, (Lewis' ed.) sec. 237; *State v. Douglass*, 20 W. Va. 770; *Spaulding v. State*, 61 Neb. 289; *State v. Snowden*, 23 Utah, 318;) yet the client himself can waive such privilege, and does so where he voluntarily testifies himself to confidential communications between himself and his attorney. Such waiver, however, extends no further than the subject matter concerning which testimony had been given by the client. 1 Thornton on Attorneys, secs. 92, 130, and cited cases; *Knight v. People*, 192 Ill. 170.

Counsel for plaintiff in error argue that section 215 of the Criminal Code, upon which this indictment is based, requires that a demand should be made of Gerold by his successor in office for the money in his hands as city treasurer after his term of office had expired, and that no such demand was made. Section 215, after stating the officials and the funds to which it refers, provides that (when the amount is over \$100) if any such officer "shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writ-

ing, he shall be imprisoned in the penitentiary not less than one nor more than ten years: *Provided*, such demand need not be made when, from the absence or fault of the offender, the same cannot conveniently be made," etc. Whatever argument there might be as to the proper construction of this statute on the question of demand has been answered by the decisions of this court in *Dreyer v. People*, 176 Ill. 590, and *Town of Cicero v. Hall*, 240 id. 160. Under the construction there put upon this statute a demand is required, except as stated in the proviso just quoted. The statute should be given a reasonable and practical construction as to what amounts to a demand. So construed, no other conclusion can be reached than that by the various conferences between Gerold and his successor, Keating, and their respective attorneys, it was clearly understood a demand was being made, and that the money was not turned over, not because there was no formal demand but because they could not agree as to the separation of the funds.

Counsel for plaintiff in error further insist on this same point, that this being the proper construction of the statute, the court erred in giving the first instruction for the People, which reads:

"The court instructs the jury that if you believe, from the evidence, beyond a reasonable doubt, that the defendant, as treasurer of the city of East St. Louis, collected and received certain moneys of the city of East St. Louis in excess of \$100, and that he failed and refused, when required by law or on demand by his successor in office, to pay and deliver over said amount to his successor in said office, in manner and form as charged in the indictment, then you should find the defendant guilty."

The argument is, that this instruction, by stating that plaintiff in error "failed and refused, when required by law or on demand by his successor in office," etc., would lead the jury to think that no demand was necessary. Counsel for the State insist that the language objected to is a

quotation from said section 215 of the Criminal Code and therefore it is not erroneous. This instruction, considered alone, might have misled the jury in view of the evidence in the record that a part of the money which the indictment charged plaintiff in error with not turning over was withheld because of the dispute as to separating it into funds. The instruction should not have been given. The sixth instruction was faulty in its wording for substantially the same reasons as the first instruction.

Counsel for plaintiff in error further argue that instruction 3 given for the People is erroneous. That instruction reads:

"The court further instructs you in this connection that the law permits persons charged with crime to testify in their own behalf, and that when the defendant testified in this case he differs from other witnesses only in the fact that he, the defendant, is charged and being tried for crime, which you may take into consideration in passing upon his credibility, but in every other respect his testimony must be treated the same as that of other witnesses who have testified in this case and is to be subjected to the same tests as are legally applicable to other witnesses; and in determining the degree of credibility that shall be given to his testimony you may, in addition to his interest in the result of the case, take into consideration the reasonableness of the story he tells and his demeanor on the witness stand while testifying; and you may also take into consideration the fact, if you find, from the evidence before you, that such is the fact, that he has been contradicted as to matters material to the issue in this case by other witnesses who are credible and who have testified before you, and if, after candidly and impartially considering all of the defendant's evidence in connection with all the other evidence in the case, and after applying all these tests, you then deem it unworthy of belief, you may then disregard it, except so far as it is corroborated by other credible evidence given be-



fore you or circumstances in evidence, but you should not disregard it merely because he is the defendant."

The wording as to the first part of this instruction is objectionable, in that it might lead the jury to treat the testimony of plaintiff in error different from that of other witnesses and therefore be subject to the criticisms of instructions of that character set forth in *Hellyer v. People*, 186 Ill. 550, *People v. Arnold*, 248 id. 169, and *People v. Barkas*, 255 id. 516. The wording of the instruction, approved by this court in *Hirschman v. People*, 101 Ill. 568, *Rider v. People*, 110 id. 11, and several other decisions, can by no possibility mislead the jury on this point. There is, however, a more serious objection to the instruction. After reciting the various things to be taken into consideration by the jury in passing upon plaintiff in error's testimony, it continues, "and after applying all these tests you then deem it unworthy of belief you may then disregard it, except," etc. For what reasons shall his testimony be deemed "unworthy of belief?" It has been repeatedly stated by this court that the testimony of plaintiff in error or any other witness cannot be disregarded unless he has knowingly and willfully testified falsely on material matters. (*Chicago City Railway Co. v. Ryan*, 225 Ill. 287; *Godair v. Ham Nat. Bank*, 225 id. 572, and cases cited; *Miller v. People*, 229 id. 376; *People v. Scarbak*, 245 id. 435; *People v. Tielke*, 259 id. 88.) Under the reasoning of these authorities the giving of this instruction was clearly error, as no such condition or qualification is found therein.

The twelfth instruction given for the People reads:

"The court instructs you, as a matter of law, that the rule which clothes every person accused of crime with the presumption of innocence and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt is not intended to aid anyone who is, in fact, guilty of crime to escape."

Plaintiff in error insists that it is incorrect because in its brief form the latter part of the instruction was calculated to minimize and disparage the principle laid down in the first part. Counsel for the People state that this instruction has been approved in *People v. Scarbak, supra*, and other decisions of this court. In this counsel are mistaken. In *People v. Scarbak, supra*, and *Spies v. People*, 122 Ill. 1, an instruction in identical language with the first part of this instruction was given, but in those cases it concluded with the added clause, "but is a humane provision of the law, intended, so far as human agencies can, to prevent any innocent person being unjustly punished." The instruction should have contained the clause just quoted. While the giving of this instruction in this form in this case might not be reversible error, the instruction should have been given, if at all, in the form heretofore sanctioned by this court.

Questions have been raised as to the giving and refusing of certain other instructions. What we have already said in this opinion disposes, we think, of all such questions. We find no such serious error in other instructions as to require our consideration.

Counsel for plaintiff in error further contend that error was committed because the bailiff in charge of the jury was not sworn at the close of the case, when the jury retired in his charge to consider the verdict; also in permitting the jury, during the trial, to see picture shows, (both parties, as we understand the record, consenting at the time,) and that the court should have granted a new trial on the showing made that two of the jurors were not fair and impartial, as in their answers they made untruthful statements as to their competency. These questions, and also others with reference to the proper custody of the jury, do not require our consideration, as the cause must be reversed for other reasons and these questions are not liable to arise in another trial.

Counsel for plaintiff in error further argue that the evidence in support of the twenty-six counts of the bill of particulars which have not been considered and passed upon separately in this opinion does not justify a verdict under any of them. Counsel for the State just as earnestly insist that the evidence clearly shows the guilt of plaintiff in error under each of these counts. As this case must be tried again we shall not express an opinion or comment on the evidence further than we have already done.

For the reasons stated the judgment of the city court of East St. Louis must be reversed and the cause remanded.

*Reversed and remanded.*

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SOLOMON WARD, Appellee, vs. THE MISSISSIPPI RIVER  
POWER COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TRESPASS—when defendant may, as a matter of right, file a plea of *liberum tenementum*. In an action of trespass *quare clausum fregit*, where the declaration is general, without any specific description of the *locus in quo*, if the defendant has any land in the same county he may, of right, file a plea of *liberum tenementum*, and the effect of such plea is to require the plaintiff to make a new assignment particularly describing the *locus in quo*.

2. SAME—when a general allegation of a trespass upon a close in the county is not sufficient. A general allegation of a trespass upon the close of the plaintiff in the county is sufficient as against a wrongdoer who commits a trespass without any pretense of right or title, but if the defendant files a plea of *liberum tenementum* the general allegation is not sufficient.

APPEAL from the Circuit Court of Madison county;  
the Hon. W. E. HADLEY, Judge, presiding.

JOHN F. MCGINNIS, for appellant.

JOHN J. BRENHOLT, for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court :

Appellee brought an action of trespass *quare clausum fregit* against the Mississippi River Power Company in the circuit court of Madison county and recovered a judgment for \$150. The defendant below prosecuted an appeal to the Appellate Court for the Fourth District, and that court being of the opinion that a freehold was involved, transferred the cause to this court .

The declaration was in one count, and charged that the defendant, on the 14th day of July, 1913, and on other days and times between that day and the commencement of this suit, with force and arms and against the protest of plaintiff destroyed timber of the plaintiff growing upon certain lands of the plaintiff, and felled, cut and destroyed the trees and saplings, stating, under *videlicet*, various numbers and varieties of trees, of the aggregate value of \$800, then growing and being in and upon certain lands there situate, and took and carried away said trees and saplings and converted and disposed of the same for its own use. To this declaration appellant filed a plea of the general issue and also two special pleas, which technically would be designated pleas of *liberum tenementum*. Afterwards, upon leave granted, a third special plea similar to the other two was filed. On motion of appellee the court struck the three special pleas from the files and the case went to trial before a jury upon the issue formed by the general plea of not guilty. The pleas of *liberum tenementum* were proper pleas, and the court erred in striking them from the files.

The appellee alleged a trespass upon a close in Madison county, without any more definite or particular description, which is sufficient as against a wrongdoer who commits a trespass without any pretense of right or title, but by its pleas of *liberum tenementum* appellant alleged that it was the owner of said close. These pleas constituted a complete defense if proven. The rule has been always recognized in

this jurisdiction, that if the declaration be general, without describing the *locus in quo*, and the defendant has any land in the same jurisdiction, plaintiff must always make a new assignment, setting out a description with more certainty. (*Fort Dearborn Lodge v. Klein*, 115 Ill. 177; *Marks v. Madsen*, 261 id. 51; 1 Chitty's Pl. 595.) The issue under such plea is whether the premises referred to in the declaration belonged to the defendant, and there being no particular description the defendant could show title to any land in the jurisdiction. The defendant in actions of this kind may, as a matter of right, file such plea, the effect of which is to require the plaintiff to re-assign, setting out a particular description of the *locus in quo*. The evidence in the case before us discloses that appellant owns a right of way sixty feet in width, title to which was obtained from Nick Runtz. The right of way was along the north line of the Runtz land. Appellee claims to be the owner of a tract of land adjoining the Runtz land on the north. His contention is, that in clearing off the sixty-foot right of way appellant got upon his land and committed the supposed trespass. Appellant being the owner of a strip of land sixty feet in width in Madison county would have been entitled to a verdict under its stricken pleas unless the appellee had re-assigned, describing the *locus in quo* more particularly. With pleas of *liberum tenementum* on file, if the appellee elects to re-assign, the ultimate issue between the parties would be the true location of the boundary line between the respective owners. While evidence of that general character was introduced at the trial of the case below the pleadings did not present any such issue.

The judgment of the circuit court of Madison county is reversed and the cause remanded.

*Reversed and remanded.*

THE PEOPLE *ex rel.* Peter Jurgensen, Petitioner, *vs.* ANTHONY CZARNECKI *et al.* Respondents.

*Opinion filed December 16, 1914.*

1. ELECTIONS—*county commissioners of Cook county are constitutional officers.* The county commissioners of Cook county are constitutional officers as distinguished from legislative officers, so called, who are elected to offices which can be created by the legislature.

2. SAME—*the legislature cannot change qualifications of electors for county commissioners.* The legislature has no power to change the qualifications specified in section 1 of article 7 of the constitution for electors for county commissioners, notwithstanding section 7 of article 10 of the constitution provides that such commissioners shall be selected "in such manner as may be provided by law," as the word "manner" refers only to the usual details required for holding an election.

3. SAME—*women cannot vote for the county commissioners of Cook county nor for the president of such board.* The Women's Suffrage act of 1913 does not authorize women to vote for county commissioners of Cook county, nor can they vote for the president of such board of commissioners even though such office is not provided for in the constitution, as the law requires that the president of the board must be one of the candidates for the office of county commissioner.

ORIGINAL petition for *mandamus*.

MACLAY HOYNE, State's Attorney, AMOS C. MILLER, SIDNEY S. GORHAM, HENRY W. WALES, and GILBERT NOXON, for petitioner.

I. T. GREENACRE, SEYMOUR STEDMAN, and CATHERINE WAUGH McCULLOCH, for respondents.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The relator, upon leave duly obtained, filed in this court his original petition for a writ of *mandamus* against the respondents, constituting the board of election commission-

ers of the city of Chicago, praying that a writ of *mandamus* directed to said respondents may issue, commanding them to print and furnish to the judges of election for the November 3, 1914, election in the city of Chicago and the town of Cicero, to be used in voting by the legal women voters at said election, legal ballots which shall contain no names of candidates for the offices of members of the board of commissioners of Cook county and which shall contain no names of candidates for president of the board of county commissioners of Cook county, pursuant to the duties imposed upon said board of election commissioners by virtue of the act of the General Assembly providing for the printing and distribution of ballots at public expense, approved June 22, 1891. By leave granted, the State's attorney of Cook county was also allowed to intervene as an additional relator, with the right to join in the prayer of the petition. Respondents appeared and filed their general demurrer to said petition. By the petition and demurrer the question is raised as to the right of women voters to vote for the candidates for the offices of county commissioner and president of the board of county commissioners of Cook county.

Section 1 of article 7 of the constitution of 1870 originally prescribed the qualifications of voters and restricted the elective franchise to male citizens above the age of twenty-one years, and the General Assembly that met after the adoption of the constitution enacted a law fixing the qualifications of voters the same as provided by the constitution. (Hurd's Stat. 1913, chap. 46, sec. 65.) This law remained in force without change until in 1891, when the General Assembly enacted a law providing that any woman who is a citizen of the United States and has attained the age of twenty-one years, and who has resided in the State one year, in the county ninety days and in the election precinct thirty days preceding an election held for the purpose of choosing any school officer under the general or special school laws of this State, shall be entitled to vote

at such election. The constitutionality of this law was attacked and came before this court in the case of *People v. English*, 139 Ill. 622, in which case this court decided that the legislature had no power to give to women the right to vote for a county superintendent of schools, for the reason that such officer was provided for by the constitution, and that no person not possessing the qualifications of electors as prescribed in section 1 of article 7 of the constitution had the right to vote for such constitutional officer. The law of 1891 was again before this court in the case of *Plummer v. Yost*, 144 Ill. 68, in which case this court held that the law was constitutional so far as it involved the right of women to vote for school officers other than the county superintendent of schools and the State superintendent of public instruction, who were constitutional officers as distinguished from legislative officers, so-called, who are elected to offices that are created by the legislature.

On June 26, 1913, there was enacted by the General Assembly the so-called Woman's Suffrage act, which provides that women citizens of the United States possessing certain qualifications as to age and residence shall be allowed to vote at elections for certain officers named in the act, all of which are legislative officers, and it is by reason of this law that women have the right, if at all, to vote for candidates for the offices of county commissioners and president of the board of county commissioners of Cook county. This law has been held valid and constitutional by this court in the recent case of *Scown v. Czarnecki*, 264 Ill. 305. The opinion in the latter case expressly holds that no person can vote for the election of any officer mentioned in the constitution unless he possesses the qualifications of an elector prescribed in that instrument. This was also the holding in *Plummer v. Yost* and *People v. English*, *supra*. If, therefore, the county commissioners of Cook county and the president of the board of county commissioners of Cook county are constitutional officers, those cases would be



decisive of the question as to whether or not women would be entitled, in any event, to vote for such officers.

In section 7 of article 10 of the constitution of 1870 it is provided: "The county affairs of Cook county shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the city of Chicago and five from towns outside of said city, in such manner as may be provided by law." It will thus be seen that the county commissioners of Cook county are officers mentioned and provided for by the constitution, (*People v. McCormick*, 261 Ill. 413,)—just as much so as any other officer mentioned and provided for in that instrument,—and it has never been contended, and is not contended by respondents, that women are entitled to vote for constitutional officers. County commissioners and president of the board of county commissioners of Cook county are not among those officers specifically named for which women are allowed to vote by the act of June 26, 1913, and under the holdings of this court it would make no difference if such officers were mentioned in that act if they are officers created by the constitution. Respondents have cited no authority in support of their position that women are entitled to vote for these officers, except *People v. English* and *Scown v. Czarnecki*, *supra*, and these cases are against the contentions of the respondents.

Respondents contend that section 7 of article 10 of the constitution set out above, providing that said county commissioners shall be selected "in such manner as may be provided by law," gives the legislature the right to provide by law for the election of these commissioners by any class of voters which they may see fit; that the legislature having provided by the act approved June 5, 1913, (Hurd's Stat. chap. 34, sec. 60,) that the aforesaid county commissioners shall be elected by the legal voters of Cook county, and having by the so-called Woman's Suffrage act provided that women are legal voters for certain officers therein

named, all of which are officers created by the legislature as distinguished from those created by the constitution, therefore women are legal voters within the meaning of those words and qualified to vote for the candidates for county commissioners. In *People v. English, supra*, the force and effect of the provision contained in section 5 of article 8 of the constitution as to filling the office of county superintendent of schools, that "the time and manner of election shall be prescribed by law," were fully discussed, and it was there said: "In section 7 of article 10 it is provided 'the county affairs of Cook county shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the city of Chicago and five from towns outside of that city, in such manner as may be provided by law.' It will hardly be contended that by virtue of the words 'in such manner as may be provided by law,' it would be competent for the legislature to enact that at elections in Cook county for members of the board of county commissioners either all women of the age of twenty-one years or all aliens who have declared their intention to become citizens of the United States may vote. \* \* \* We think that the word 'manner,' found in section 5 of article 8 of the constitution, should receive like interpretation with that placed upon the same word found in articles 5 and 10 of the same instrument, and that said word in article 5 indicates merely that the legislature may provide by law the usual, ordinary or necessary details required for the holding of the election."

It is further contended by respondents that the officer known as president of the board of county commissioners of Cook county is not mentioned in the constitution; that his office is created by the legislature, and being a legislative office the legislature may prescribe the qualifications of voters for such office, as held in *Scown v. Czarnecki, supra*. While it is true that the president of the board is not mentioned in the constitution, still such president must be one

of the commissioners to be elected. Section 61 of chapter 34 of Hurd's Statutes of 1913 provides for the election of the president of the county board, as follows: "Every legal voter in said county may vote for and designate (upon his ballot cast for county commissioners) one of the candidates for commissioner to be president of the county board, and the person who shall receive the highest number of such votes shall be declared elected president of said board." It will thus be seen that whoever is elected president of the county board must also be elected a commissioner, and no one can be elected to the office of president of the board without at the same time being elected a commissioner. In voting for candidates for this office the electors elect commissioners, and, incidentally, they vote for one of those commissioners as president, and the one that receives the highest number of votes as president, in addition to being elected a commissioner, is also elected president of the board. This being true, only those electors who are qualified to vote for commissioners are qualified to vote for one of said commissioners as president of the board.

Holding, as we must, that the county commissioners of Cook county are officers provided for by the constitution, under all the decisions of this court and all the authorities that we are able to find on the subject only those who possess the qualifications of electors as provided in the constitution can vote for such commissioners and for one of their number to be president of the county board.

For the reasons given, the demurrer to the petition will be overruled and the writ of *mandamus* awarded as prayed in the petition.

*Writ awarded.*

THE PEOPLE *ex rel.* John P. Martin, County Collector, Appellee, *vs.* THE CAIRO, VINCENNES AND CHICAGO RAILWAY COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—*amount voluntarily paid in labor cannot be set off against subsequent tax.* The amount voluntarily paid in labor to satisfy a district road tax cannot be set off against a subsequent road and bridge tax levied under a new law.

2. SAME—*what does not render special hard roads tax invalid.* The fact that a special hard roads tax was put upon the tax books before it was due and judgment was for that reason refused, does not furnish a valid objection to such tax when it is put upon the next year's tax books after it is due.

3. SAME—*lien for taxes is confined to the property in the taxing district.* The lien upon property for taxes is confined to the property in the taxing district, and hence a judgment against railroad property for a special hard roads tax of a certain town should be limited to the property of the railroad company in such town.

APPEAL from the County Court of Lawrence county; the Hon. J. A. BENSON, Judge, presiding.

P. J. KOLB, (L. J. HACKNEY, and FRANK L. LITTLETON, of counsel,) for appellant.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Prior to July 1, 1913, when the present Road and Bridge law became effective, the towns of Bond, Lawrence and Dennison, in Lawrence county, were under the labor system and had levied district road taxes under the then existing Road and Bridge law. The appellant owned land in said towns in road districts 1 and 2 in the town of Bond, road districts 1 and 2 in the town of Lawrence, and road districts 3, 4 and 5 in the town of Dennison, and paid the taxes in the several road districts in labor under the direction of the several overseers and took receipts from such

overseers for the payments. A special hard road tax was levied by the town of Dennison and was extended against the property of appellant in the year 1912 before it was due. On objection the court refused judgment for such tax and the county clerk put the tax on the tax book for the year 1913. In the present year the county collector applied for judgment for the road and bridge taxes and the hard road tax, and the appellant filed objections, stating that it had paid the district road tax in the manner authorized by law by causing labor to be performed under the direction of the overseers of highways and was entitled to credit for the amount so paid as against the road and bridge taxes, and that the hard road tax was illegal and void. The facts above stated were stipulated or proved, and the court overruled the objections and rendered judgment for the taxes, with an order of sale of the appellant's property to satisfy them.

Appellant contends that the repeal of the Road and Bridge law in force before July 1, 1913, put an end to all right to proceed further for the collection of the district road taxes, and as they could not be collected after the new law went into effect, it should have credit against the road and bridge taxes for the amount paid in labor under the provisions of the old law. The payments in labor were made voluntarily, without objection or protest, and if, under such circumstances, they cannot be recovered back, the appellant cannot be allowed any credit for such payments. The fact that the special hard road tax of the town of Dennison had been put on the tax book the previous year before it was due was no defense to the application for judgment when it had been put on the tax book after it became due. The court did not err in overruling the objections. The court, however, erred in rendering judgment for the taxes against the entire property of the appellant in the county of Lawrence, since the lien upon property for taxes is confined to the property in the taxing district.

*Wabash, St. Louis and Pacific Railway Co. v. People*, 137 Ill. 181; *People v. Cincinnati, Indianapolis and Western Railway Co.* 261 id. 582.

The judgment is reversed and the cause is remanded to the county court, with directions to enter a proper judgment limited to the property of appellant in the several taxing districts.

*Reversed and remanded, with directions.*

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THE PEOPLE *ex rel.* Robert Hewitt, County Collector, Appellee, *vs.* THE KANKAKEE AND SENECA RAILROAD COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—*power of county to levy tax need not be given in express terms.* A county board may exercise such power of taxation for county purposes as is fairly implied in or incidental to power expressly given, and it is not essential that the power be given in express terms if it is fairly implied from the language of the statute.

2. SAME—*section 22 of the State Aid Roads act is not the sole source of county's power to raise money for State aid roads.* Section 22 of the State Aid Roads act of 1913 (Laws of 1913, p. 520,) is not the only provision of the act to be considered in determining the intention of the legislature as to the manner in which county boards may exercise the power to raise money for State aid roads.

3. SAME—*county board has implied power to levy tax for State aid roads.* Under section 15c of the State Aid Roads act, providing that it shall be considered a sufficient acceptance of the allotment to a county if the county board shall give notice to the State highway commission that it has assessed a tax to raise its portion of the cost, power to levy a tax to raise such amount is implied, and the county board is not limited to the provisions of section 22 of said act.

4. SAME—*providing a sum of money equal to the allotment to county for State aid roads is a county purpose.* Providing a sum of money equal to the allotment to a county by the State highway commission for State aid roads is a county purpose, within the meaning of section 25 of the act relating to counties.

APPEAL from the County Court of Kankakee county; the Hon. A. W. DESELM, Judge, presiding.

W. R. HUNTER, (L. J. HACKNEY, of counsel,) for appellant.

WAYNE H. DYER, State's Attorney, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

This proceeding was begun in the county court of Kankakee county to obtain judgment against the lands of the appellant for taxes of 1913 alleged to be delinquent. Objections were filed by the appellant to that portion of the county tax levied to raise money for a State aid road, on the ground that the methods specified in the statute were not followed as a basis for the levy of a tax. The objections were overruled and judgment entered, and the record has been brought here for review.

The objections were based on section 22 of the act entitled "An act revising the law in relation to roads and bridges," in force July 1, 1913. (Laws of 1913, p. 520.) That section provides that in case a county board desires that provision be made for the construction of a State aid road it may proceed in either of the methods following:

"(1) In case there be sufficient funds in the county treasury available therefor, the county board may appropriate therefrom sufficient to meet one-half the cost of the improvement.

"(2) If the county board so desires and deems it necessary for the purpose of the improvement herein authorized, the said county board, in the manner now provided by law for issuing bonds for county purposes, may submit to the legal voters of their county the question of issuing such county bonds."

The county board of Kankakee county did not adopt either of these methods but levied the tax in question to raise one-half of the cost of improving highways under the act. The position taken by the appellant is that these two methods are exclusive, and that money must be either appropriated from funds already in the county treasury and available for the purpose, or must be raised by issuing bonds in pursuance of an election. In determining whether that position is correct, and ascertaining the intention of the General Assembly, every provision of the act is to be taken into account and every possible effect given to each.

The general purpose of the act is to provide for the improvement of public highways at the joint expense of the State and the several counties, each contributing one-half. To carry out the scheme, the act first provides for the designation by each county board of highways which shall come under the provisions of the act, and they are to be designated upon a map submitted to the State highway commission. The map may be approved or changed by the commission and is to be returned to the county clerk, the commission retaining a copy. The act then provides for an allotment each year to each county of an amount, to be determined as provided in the act, to defray the cost of constructing State aid roads. Section 15*b* provides that if any county shall, within six months from the date of the allotment, fail to provide and appropriate an amount equal to the allotment, the amount allotted shall be forfeited by the county. Section 15*c* provides that it shall be considered sufficient acceptance of the allotment to a county if the county board shall give notice to the State highway commission that it has assessed a tax to raise its portion of the cost, or that it has passed an order submitting to a vote of the people the question of raising an additional tax or issuing bonds for the purpose specified in the act. Beginning with section 16, the act then provides that the county board of any county may initiate



proceedings for the construction of a State aid road along a route that has been designated, by passing a resolution that the public interest demands the improvement of a highway or section thereof, and requesting that it be constructed or improved as provided in the act. That resolution is to be transmitted to the highway commission, which may approve or disapprove of the improvement proposed by the county board making the application. If the commission decides in favor of the construction or improvement of the public highway or section, surveys, plans, specifications and estimates are to be made, after which the commission is to finally determine whether the construction or improvement shall be made. The determination is to be transmitted to the county board, and section 22 then provides that the county board may adopt a final resolution, which shall not thereafter be rescinded or annulled, either directly or indirectly, except under the advice and with the consent of the commission. This is followed by the provision above quoted and relied upon by appellant.

It will be readily seen that section 22 is not the only section to be considered in determining the intention of the General Assembly as to the manner in which county boards may exercise the power to raise money for State aid roads. In deciding the question presented we are to be governed by the established rule that laws authorizing taxation are to be strictly construed, and where a statute prescribes a certain method to be adopted to subject property to the burden of taxation, that method must be substantially complied with before the property can be taken and sold. (*People v. Chicago and Illinois Midland Railway Co.* 260 Ill. 624.) The authority to levy a tax must clearly appear to have been conferred by law upon any board or officials assuming to exercise it. (*School Directors v. Fogleman*, 76 Ill. 189.) This court stated the correct rule in *Wheeler v. County of Wayne*, 132 Ill. 599, and repeated it in *Stevens v. Henry County*, 218 id. 468, as

follows: "Counties can only exercise such powers, first, as are granted by express words; second, those necessarily or fairly implied in or incident to the powers expressed; and third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." Under that rule the county board may exercise such power of taxation as is fairly implied in or incident to power expressly given, and it is not essential that the power be given in express terms if it is fairly implied from the language of the statute. (*Peoria, Decatur and Evansville Railway Co. v. People*, 116 Ill. 401.) Power is expressly given to county boards by section 25 of chapter 34 of the Revised Statutes of 1874 to levy and collect taxes for county purposes, including all purposes for which money may be raised by taxation, not exceeding the limit of seventy-five cents on the \$100 valuation of taxable property fixed by that section and by section 8 of article 9 of the constitution. It cannot be, and is not, denied that providing an amount equal to the allotment of the State highway commission for the construction or improvement of public highways is a county purpose. The act in question provides that the allotment shall be forfeited unless accepted within six months, and that the acceptance may be by a notice that a tax has been assessed by the county board to raise an amount equal to the allotment. Of course, a board could not give notice that a tax had been assessed unless the fact existed, and the fact could not exist and an amount equal to the allotment to the county be raised in that way unless such a tax would be a proper charge against the taxable property of the county.

No other conclusion than that the General Assembly intended to give the county board power to assess a tax can be reached. County boards have express power to raise money for county purposes by levying taxes within the constitutional and statutory limit, and inasmuch as the General Assembly has conferred authority to accept allotments for

a county purpose by raising an equal amount, it is a necessary implication that they have power to levy taxes to accomplish that object. It is true that by section 15c an acceptance may be made by notice that the question of an additional tax or issuing bonds has been submitted to a vote of the people and that the proposition might be rejected at an election and the acceptance thereby fail, but that does not affect the question whether a tax is valid where the county board determines upon that method which will surely raise the amount required.

Considering all the provisions of the act, we conclude that the methods mentioned in section 22 are not exclusive, and that the court did not err in overruling the objections.

The judgment is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* Joseph M. Brown, County Collector,  
Appellee, *vs.* THE TOLEDO, ST. LOUIS AND WESTERN  
RAILROAD COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—item “for repairs of county property” is sufficiently definite. An item of a county tax “for repairs of county property” is sufficiently definite to meet the requirement of section 121 of the Revenue act as to the several purposes of a county tax being stated separately.

2. SAME—items of “sinking fund, \$1000, interest, \$475,” sufficiently state the purpose of the tax. Items of a county tax for “sinking fund, \$1000, interest, \$475,” sufficiently state the purpose of the tax in view of the language of the act of 1905 enabling county boards to issue bonds and levy a tax for accrued interest and a sufficient sum to be set apart as a sinking fund.

3. SAME—when pay of keeper of poor farm cannot be included in item for salaries of county officers. The keeper of the county poor farm, who obtains his place by being the lowest responsible bidder for performing the duties of such keeper, is not a county officer, and his pay cannot be included in a county tax item “for salaries of county officers.”

4. SAME—*county board may include an estimated amount for salary of the State's attorney.* The county board may include in the county tax item "for salaries of county officers" a reasonable amount with which to pay the county's portion of the State's attorney's salary in case the fees, fines, forfeitures and penalties paid into the county treasury are not sufficient for that purpose.

5. SAME—*county board has the power to levy a tax for State aid roads.* A county board has power to levy a tax for State aid roads, and is not limited, in the matter of raising such fund, to section 22 of the Roads and Bridges act of 1913. (*People v. Kanakee and Seneca Railroad Co. ante*, p. 497, followed.)

6. SAME—*when an objector cannot take advantage of failure to amend record.* An objector cannot take advantage of the failure to amend a record in accordance with leave granted by the court just before taking its noon recess, where he prevailed upon the court, after the recess, to admit the record in evidence although the attorney for the People objected to its admission upon the ground that he had gone home to dinner during the recess and had not had time to make the amendment.

APPEAL from the County Court of Bond county; the Hon. WILLIAM H. DAWDY, Judge, presiding.

C. E. COOK, C. E. POPE, and H. F. DRIEMEYER, (CHARLES A. SCHMETTAU, of counsel,) for appellant.

JOHN D. BIGGS, State's Attorney, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

On the application of the county collector of Bond county for judgment against the lands of the appellant for taxes alleged to be delinquent, objections to various taxes were filed. On a hearing some of the objections were sustained, others were overruled and judgment was entered with an order of sale, from which this appeal was prosecuted.

Four items of the county tax were objected to and the objections were overruled. One of them was an item of \$1000 for repairs of county property. Section 121 of the

Revenue act, which requires the county board to determine the amount of county taxes to be raised for all purposes, requires that when the tax is for several purposes the amount for each purpose shall be stated separately. The object of this requirement is to give the tax-payer an opportunity to prevent unjust and illegal taxes. (*People v. Cleveland, Cincinnati, Chicago and St. Louis Railway Co.* 231 Ill. 209; *People v. Cairo, Vincennes and Chicago Railway Co.* 237 id. 312.) The word "repairs" designates only a single purpose, but it is objected that the amounts required for that purpose should have been distributed between the several kinds and pieces of property of the county. The statute must receive a reasonable construction, and it was plainly impossible for the county board to tell what minor repairs might be required during the coming year, from time to time, on the court house, jail, county farm buildings and other property. It would have been impossible to anticipate the amount of such items in advance, or where, either from ordinary wear and tear or from accident, some repair might become necessary. The amount levied was clearly within reason and the objection properly overruled.

The next item of the county tax objected to was, "Sinking fund, \$1000; interest, \$475,—\$1475." The argument against this tax is that the item does not state the purpose, but we think it does. The act of 1905, enabling county boards to issue bonds, (Laws of 1905, p. 132,) requires the county board of each county issuing bonds to include in the amount of all taxes to be raised for county purposes in each year a sum sufficient to pay the accruing interest on such bonds and also a sufficient sum to be set apart as a sinking fund, to be accumulated and used as a payment of the principal of the bonds at their maturity. The General Assembly did not consider it necessary to give any further definition of a sinking fund, and the county board did what it was required by statute to do. That being so,

the tax was legal and the court was right in overruling the objection.

Another item was, "For salaries of county officials, \$5000." The objection to that tax was that it was in excess of the amount necessary to pay salaries payable out of the county treasury. The salaries were fixed and certain and consisted of the following: County judge, \$700; county superintendent of highways, \$1000; State's attorney, \$1700; and members of the board of supervisors, \$400. The appellee insists that \$400 paid to the keeper of the poor farm was a salary of a county official, but that is a mistake. The keeper of the poor farm was the lowest responsible bidder for performing the duties of such keeper, and the county board entered into a contract with him to perform them for \$400. He was a mere employee and did not come within the definition of an officer contained in section 24 of article 5 of the constitution. His position was similar to that of an overseer of the poor or a janitor, who are held not to be officers. *People v. Smith*, 236 Ill. 64; *People v. Cincinnati, Lafayette and Chicago Railway Co.* 247 id. 506.

The appellant contends that the salary of the State's attorney was not payable out of funds raised by general taxation, but that position cannot be maintained. Section 2 of the act of 1913 (Laws of 1913, p. 360,) provides that the salaries of the State's attorneys, excepting that part which is to be paid out of the State treasury, shall be paid out of the county treasury of the county in which the State's attorney shall reside, in quarterly annual installments, on the order of the county board on the treasurer of the county. It provides that the State's attorney's fees shall be taxed as costs, and all fees, fines, forfeitures and penalties shall be collected by the State's attorney and shall be paid by him into the county treasury, to be held as a special fund and applied to the payment of the salaries of the State's attorneys and assistant State's attorneys, or so

much thereof as the fund will meet. By this act the payment of the State's attorney's salary is charged upon the county treasury, and any balance above the amounts paid into the treasury to make up the salary is to be raised by general taxation. The purpose of the act is to provide a method of paying the State's attorney's salary by using the moneys paid by him into the treasury. (*Hoyne v. Danisch*, 264 Ill. 467.) The act contemplates, by its language, that the amounts paid into the treasury may not be sufficient to pay the salary. It was stipulated that the State's attorney of Bond county had collected and paid to the county treasurer fees and fines aggregating \$381, and had other fees and fines aggregating \$150 which he would turn over to the county treasurer to be applied to his salary. It was necessary to raise the balance by general taxation, and the necessary amount would be properly included in the tax levy and must necessarily be estimated, since no one could tell how much might be collected in fees, fines and penalties. The item of \$5000 was in excess of the amount required by \$1730, which the court should have deducted. The amount of that item charged against the appellant was small, but a definite standard was fixed by the law which the county board had no power to exceed, and even the amount estimated for the State's attorney would be reduced by whatever might be collected by him and paid into the county treasury.

The fourth item objected to was, "For State aid roads, \$2500," and the objection was founded on the provision of section 22 of the Road and Bridge law for appropriating money in the county treasury or submitting the question of issuing bonds to the legal voters of the county. We have held such a tax legal in *People v. Kankakee and Seneca Railroad Co.* (*ante*, p. 497.)

The appellant objected to the road and bridge tax of the town of Shoal Creek on the ground that the commissioners of highways did not determine the tax rate at the

regular semi-annual meeting held between the first Tuesday in August and the first Tuesday in September. The meeting was held on August 30, but the record did not show that the rate to be thereafter certified to the county board was then determined. The appellant offered in evidence the record to show that the rate was not agreed upon at that meeting. The clerk who kept the record was dead, and the court heard evidence as to whether the record was complete and whether the rate was, in fact, determined upon. From the evidence the court gave leave to the appellee to amend the record of the meeting of August 30 to show that at that meeting the board agreed upon sixty cents on the \$100 as the tax rate without any formal motion or resolution. It is urged that although leave was given to amend the record no amendment was in fact made and the leave given did not amount to an amendment. The record shows that the court took a recess after allowing the amendment, and on meeting at 1:30 P. M. the appellant offered the record, which had not yet been amended. The attorney for the appellee objected that he went home for dinner at the recess and had not had time to make the amendment, and his objection was overruled and the record was admitted in evidence. Objection was made to admitting the record in evidence until the attorney could make the amendment, but his objection was overruled at the instance of the appellant, and we do not think the appellant should take advantage of the ruling of the court in its favor or that the record showed the amendment was not, in fact, made as soon as it could be. The court did not err in overruling the objection to the road and bridge tax.

The judgment is affirmed except as to the item of \$5000 for salaries of county officials, and as to that item it is reversed and the cause remanded to the county court, with directions to make a reduction of \$1730 therefrom and to render judgment accordingly.

*Reversed in part and remanded, with directions.*



MARY E. CARNAHAN, Appellee, vs. NATHAN HAMILTON,  
Exr., Appellant.

*Opinion filed December 16, 1914.*

1. WILLS—*when the Supreme Court will review the evidence although no peremptory instruction was asked.* In a will contest case brought directly to the Supreme Court the evidence will be reviewed regardless of whether a peremptory instruction was requested in the trial court, and the judgment will be reversed if in the judgment of the Supreme Court the judgment and verdict are clearly against the weight of the evidence. (*Dowie v. Sutton*, 227 Ill. 183, explained.)

2. SAME—*what does not show that testator lacked testamentary capacity on the day he made his will.* Testimony by a physician who treated the testator, two days after the will was made, for an abscess above the nose, to the effect that the testator was suffering intensely and that the witness did not think he was in a condition to transact ordinary business, and that he judged from what he saw and what the testator said to him that such condition had lasted several days, does not necessarily show that the testator lacked testamentary capacity when the will was made.

3. SAME—*mere infirmity and old age do not necessarily show want of testamentary capacity.* To sustain a charge of want of testamentary capacity something more must be shown than mere infirmity or old age on the part of the testator.

4. SAME—*unreasonable prejudice against relatives is not ordinarily ground for setting aside will.* An unreasonable prejudice against relatives is not ordinarily ground for setting aside a will, unless it can be explained upon no other ground than that of an insane delusion.

5. SAME—*unequal division of testator's property does not show want of testamentary capacity.* An unequal division of the testator's property among his heirs does not, of itself, justify holding that he did not possess testamentary capacity.

6. SAME—*fact that testator believed in a dream about hidden treasure does not invalidate will.* The fact that the testator related a dream he had had about hidden treasure and said he believed he would find it is not ground for holding his will invalid, where such fact in no way appears to have influenced him in making the will.

7. SAME—*what does not show want of testamentary capacity.* The facts that the testator shed tears when conversing about his

deceased daughter and grew excited at times when talking about business affairs do not show that he lacked testamentary capacity.

8. *SAME—effect of proof that testator had hardening of the arteries.* In determining the effect of proof that the testator, an old man, had hardening of the arteries, the question is not what the tendency of such disease is, but what the effect of such disease was in the particular case.

9. *SAME—person capable of transacting ordinary business has testamentary capacity.* A person who is capable of transacting ordinary business is capable of making a valid will.

10. *SAME—a witness may state that he observed no change in mental condition of testator.* A witness who was present when the will was made may state that he observed no change in the testator's mental condition then from other times he had seen him.

11. *SAME—when an instruction as to knowing the extent of property is improper.* An instruction requiring, as a condition of possessing testamentary capacity, that the testator know, "without prompting," the nature and extent of his property is improper, particularly where there is no evidence that he was prompted by anyone when he was making the will.

12. *SAME—when instruction as to justice of will is misleading.* An instruction concerning the right of the testator to leave but a small amount of property to his only direct heir is misleading, where its tendency is to cause the jury to believe they had a right to decide whether the will was just or unjust as to the various relatives and give their verdict accordingly.

APPEAL from the Circuit Court of Shelby county; the Hon. THOMAS M. JETT, Judge, presiding.

WHITAKER, WARD & PUGH, and STEIDLEY & CROCKETT, for appellant.

WILLIAM H. RAGAN, and GEORGE B. RHOADS, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a bill filed by appellee, Mary E. Carnahan, to contest the will of her grandfather, Payton A. Bond, of whom she was the only heir-at-law. After an answer and replication were filed an issue of fact was submitted to the

jury as to whether the instrument in question was the last will and testament of Payton A. Bond, deceased. The jury found in the negative. A motion for new trial was overruled and a decree entered in accordance with the verdict. Thereupon this appeal was prayed.

The will was executed on April 4, 1910, at which time Bond was seventy-two years of age. He lived until May, 1913. His wife died some fifteen years previous and he never afterward re-married. At the time of his wife's death they had one child living, Julia Ann. After his wife died Bond lived on his farm in Shelby county with said daughter, Julia Ann, and her husband, William Carnahan, until her death, January 25, 1910. She left surviving two children, one of whom was appellee, then fifteen months old, and the other a baby just born and who died within a few days after its mother. At the time of making the will Bond had three sisters living and one sister deceased, who left surviving her several children and descendants of deceased children. Very shortly after the will was executed Bond took a trip to Oklahoma, where he visited relatives. After his return he lived with one of his sisters in the city of Pana, Christian county, Illinois, until the time of his death. At the time the will was made he owned 160 acres of land in Shelby county, upon which he and his son-in-law were then residing, besides some personal property. Some time thereafter he purchased a house and lot in Pana, which he continued to own until the time of his death. By his will he gave his grand-daughter, appellee herein, \$100 and all his household goods and effects. To his sisters then living, and to the heirs of the deceased sister, he gave the 160-acre farm, the will further providing that all other personal property, goods and chattels should go to the heirs theretofore mentioned. The will contained no residuary clause as to real estate, and consequently the house and lot that he afterward acquired in the city of Pana would descend to his grand-daughter, appellee herein.

The bill averred that Payton A. Bond, the testator, was of unsound mind and memory at the time of the execution of the will; that at that time he was suffering from insane delusions and therefore did not possess testamentary capacity. Upon the trial of the case appellant produced forty witnesses who testified they were acquainted with the testator, and that in their opinion he was capable of transacting ordinary business affairs and understood the nature of his property and the natural objects of his bounty, relating various conversations they had had with him during the last few years of his life. Among this number were old acquaintances and neighbors,—farmers, physicians and bankers,—most of them having known him all the way from ten to fifty years, and many testified their acquaintance had been of an intimate nature. On behalf of appellee thirteen witnesses were introduced, the majority of them relatives of her father. Most of these thirteen witnesses testified they had seen and talked with Bond near the time he executed the will, and that at that time they did not think he was of sound mind and memory or had sufficient mental capacity to transact ordinary business, or was able mentally to understand the extent of his property or who his relatives were. It is apparent, however, from the testimony of at least one or two of these witnesses, that they were not certain on this point. The allegations of the bill admit, and it is conceded in the briefs of appellee, that subsequent to the execution of the will the testator took care of and transacted his business. The theory of counsel for appellee is that mental incapacity existed at the time of the execution of the will by reason of delusions, jealousy and sickness, from which he subsequently recovered though he never fully regained his ordinary health.

Appellant contends that the verdict is manifestly against the great weight of the evidence. Appellee contends that this question cannot be raised in this court as no motion was made at the close of all of the evidence asking for a

peremptory instruction, citing in support of this contention *Dowie v. Sutton*, 227 Ill. 183. That case was brought to this court by way of the Appellate Court. What was there said about the failure to give a peremptory instruction being a waiver of the question as to whether there was sufficient evidence to support the verdict has no bearing on a case like this, brought here directly from the trial court. In that case the court cited *Long v. Long*, 107 Ill. 210, where it was said the rule is well settled by the previous decisions of this court that in will contests like the present "the finding of the jury is conclusive unless clearly against the weight of evidence, [citing authorities,] and in this respect they are put upon the same footing with cases at law. Such being the case, it would seem to follow—and we so hold—the finding of the Appellate Court in conformity with the verdict of the jury is conclusive upon all questions of fact. Ordinarily the finding of the facts by the Appellate Court, in a chancery proceeding, is not conclusive on this court, but this class of cases, under the construction given to our statute, does not fall within the general rule, but such cases are treated in this respect, as we have already seen, as actions at law." This case was properly brought directly to this court because a freehold was involved. In all cases of this kind thus brought here this court has always reviewed the evidence regardless of whether a peremptory instruction was asked of the trial court, and has reversed such cases when in the judgment of the court the verdict of the jury was clearly and manifestly against the weight of the testimony.

The physician who attended the testator at the time of his death had known him for about ten years and testified that he had hardening of the arteries, and that this condition, in the three or four years before his death, had gradually grown worse; that he had poor circulation, generally, but mostly complained of pain in his feet; that his death was caused by gangrene, beginning in one of his feet, which condition was superinduced by hardening of the arteries;

that a man of the age of the testator at that time who has been active in his life is more or less troubled with hardening of the arteries. We judge from the record that the testator had been in fair health most of his life. There is evidence tending to show that he had an attack of *la grippe* in December, 1909, and remained in bed until near the middle of February; that he was troubled at the same time with piles and fistula; that on this account he was unable to attend either the funeral of his daughter on January 25, 1910, or that of the new-born child four days later. We think the weight of the evidence shows that he was up and around during the month of March that year, going on business or otherwise to Pana, Assumption and other near-by places. There is some evidence on the part of appellee that during this time he complained that his head troubled him. Two days after the will was drawn Dr. Martin, who had treated him in the preceding January for the "grip," testified he was called from Tower Hill to treat him; that on April 6 in question he found him in bed with a high temperature and apparently suffering intensely, and that the cause was an abscess just over the nose, in the forehead; that he saw him later, on April 25, and the abscess had broken and he was practically recovered. He testified, also, that he noticed that the testator's arteries were hardening, and other conditions arising from old age. This is substantially all the testimony in the record bearing on the testator's physical condition during the last three or four years of his life. So far as the record discloses he was in fair health, considering his age, after April, 1910, until his final sickness, which lasted only a few days.

In the forenoon of April 4, 1910, testator left his farm, where he was residing with his son-in-law, William Carnahan, and walked to the home of a neighbor, Joseph Kelly, living about three miles and a half away, where he had the will in question drawn by Kelly. Charles Simmons, another neighbor, who lived about a mile south of the Bond home,

testified that he had met the testator going to Kelly's, and the two, having been acquainted for years and having often transacted business together, stopped and had quite a visit; that during the conversation Bond asked Simmons if he had seen Kelly pass there that morning, stating that he was going to Kelly's to have his will made; that he was going to take a trip out west and might meet with an accident or might get sick, and he wanted his business matters fixed up before he went away. Simmons further stated that after they parted testator went on toward Kelly's home. Joseph Kelly, who drafted the instrument here in question, died in May thereafter. His wife testified that the testator came to their house the morning of April 4 and talked with her husband about making his will. The witness had known testator all his life and talked with him on that day. Her husband and testator sat down at a table to write the will, Mrs. Kelly leaving the room. After the will was written, some time that afternoon, Bond left to get someone to witness it, and came back with Isaac Lockwood and George W. Simpson, who signed as witnesses. Mrs. Kelly further testified that in her conversation with testator he spoke of his sisters and said they were always good to him and that he wanted to leave something to them, and also spoke of his grand-daughter (appellee herein) in a friendly way; that he said nothing while he was there to indicate that he was angry with any of his relatives. Lockwood and Simpson were plowing in a field about a quarter of a mile from Kelly's house when the testator asked them to witness his will. They consented and walked with him to Kelly's, where the will was signed and witnessed. They talked with him in a general way from the field to the house, and both testified that he showed no anger at the time the will was signed or at any time that day when they saw him. Both of these witnesses had known him for years. Mr. and Mrs. Kelly, Lockwood and Simpson were the only ones present with testator in the house at the time the will was signed and wit-

nessed. The three that were living all testified that they believed him to be of sound mind and memory at that time, and that he was able to transact the ordinary business affairs of life and understood what property he owned, who were his heirs and the natural objects of his bounty. Charles Simmons testified that testator on that or the next evening came to his house and drank a cup of coffee at the supper table, remaining there, visiting, some twenty or thirty minutes. Simmons and Simpson saw him frequently between the time the will was drawn and the date of his death, and both testified that they thought he had testamentary capacity at all of their interviews. Many farmers who lived near Bond, and a number of merchants and business men who had known him and met him before, about the time and after the will was drawn, all testified substantially to the same effect,—that in their judgment he was a man of sound and disposing mind and memory. The physician who attended him during his last illness testified that in his judgment Bond's mental condition was such in 1910, and until his death, that he was able to transact ordinary business affairs, understand what property he owned and who were his relatives. He stated on cross-examination that a person having hardening of the arteries was sometimes affected thereby so that he might be predisposed to irrational likes and dislikes. There was, however, nothing in the testimony of this witness that indicated that he was of the opinion that the testator was predisposed in this way. Dr. Martin, to whose testimony we have heretofore referred with reference to treatment for an abscess on April 6, 1910, stated on direct examination for appellant that in his judgment, in the years 1909, 1910 and 1911, testator was competent to transact the ordinary affairs of life and understood the extent of his property, who were his heirs and the natural objects of his bounty. He stated on cross-examination that on April 6, 1910, when he treated testator for this abscess, he did not think testator was in condition to transact ordinary



business, and that from what the testator said to him then and what he saw, the condition he found him in was one that in his opinion had existed for several days. We do not understand this witness' testimony as stating, as contended by counsel for appellee, that he (the doctor) thought testator lacked testamentary capacity at that time, but only that he was in such pain then that witness would not say he was in a condition to transact ordinary business.

There was nothing in the testimony of any of the forty witnesses who testified for the appellant, except that of Dr. Martin, to which we have just referred, that could in any way be construed as indicating that the testator was not of sound and disposing mind and memory at or about the time the will was executed or at any other time, or that there was anything in his actions or talk that in the slightest degree indicated that he was possessed of an insane delusion or harbored an unreasonable jealousy against any of his relatives or friends. It would serve no useful purpose to set out in detail the testimony of all these forty witnesses. They are all in substantial accord upon the issue here involved.

Mrs. Alta Rowley, who was a niece of William Carnahan, appellee's father, lived in testator's family from the time of his daughter's death, in January, 1910, until June after the will was executed. She was at that time seventeen years of age and unmarried. She testified that she thought testator was not of sound mind from February to June of that year; that she did not mean that he was of unsound mind at all times, but that he had spells, and when he had these spells he was not of sound mind; that usually he talked naturally, just as anyone else would, but would get worked up and nervous at times. The witness further testified that while she worked there Bond proposed marriage to her; that she advised him to get someone older than she was, and he replied she was his choice; that he would only live a few years, and if she married him she would have a

home after he was gone and could take someone younger; that he never talked to her about marriage but this once; that she overheard him ask Mrs. Halbrook, who was then living there, to marry him.

Mrs. Mary Halbrook (now Mrs. Carnahan, the wife of appellee's father,) testified that from February 20 to April 4, 1910, testator was not of sound mind and memory, did not understand what property he owned or its value or who his relatives were; that she had known the testator as long as she was old enough to remember, and that she was keeping house for him and Carnahan, with the assistance of the witness last referred to, after Mrs. Carnahan's death until she married Carnahan, in June of that year. She testified that the testator proposed marriage to her in March, 1910; that during that conversation he asked her if she would drop one of her admirers and marry him; that if she would do that she would have a home the rest of her days. She testified that during that or another conversation on the subject he asked her whether she was engaged to Oscar Pope or William Carnahan, saying it was all right if she was going to marry the former but he did not want her to marry Carnahan; that he stated that if she did not marry him he would change his will and go out west; that when she refused him he became sullen and remained in that condition for several days; that during these talks about marriage he would sometimes cry and seem quite excited; that the last conversation he had with her about this matter was April 4, 1910; that she did not see him again until late that evening. Mrs. Carnahan further testified that when Bond came home after the will was drawn he was taken sick in the night, and the next morning Dr. Martin was called and treated him for the abscess heretofore referred to. The witness further stated that during her conversations with the testator he had talked about some money he said his father had buried on the old home place by a stump, and that he had dug for this money and believed he would be able to find it. The witness fur-

ther testified that she had been married three times and that she had been divorced from her second husband; that shortly before the testator had proposed to her she had been engaged to Oscar Pope, but had broken that engagement prior to her talks with the testator.

William Carnahan, the father of appellee, testified that he believed that when the testator left home on the morning of April 4, 1910, he knew what he was talking about and had sense enough to know who his relatives were and what property he owned. He testified that after the testator's daughter's death he (the witness) told Bond he did not know what he was going to do with appellee; that he did not see how he could take care of her and keep the home; that he had about decided to put her in an orphanage; that testator broke down and cried and said to the witness to get somebody to come and keep house; that he did not want the child taken away; that it was not right to take her to a strange place; that because of this they got Mrs. Halbrook and Alta Hoover (now Mrs. Rowley) to keep house for them and look after the little girl; that he (the witness) had a sale of some personal property on testator's farm in March, 1910, and that the testator on the day of the sale began piling up some chairs and a patent churn and washing machine and articles of furniture that he owned and said he was going to sell them at the sale; that he looked at the witness with a glare in his eyes when talking about the subject; that he finally decided not to sell the goods and said he would leave them to Mary, the appellee; that testator was a peculiar man, with a very high temper at times, and that he would get mad and go all to pieces, and you could not reason with him during these mad spells; that during the spring of 1910 testator had a row with him about the way he was plowing the garden. The testimony in the record tends to show that William Carnahan had trouble at one time with his wife, testator's daughter, and that they

were separated, but that several years before her death they began living together again.

George Kelly, the brother of the man who drew the instrument in question, testified that he met the testator on the morning of April 4 at the cross-roads near his brother's place and that they had quite a long talk; that the testator talked about his proposal to Mary Halbrook; that he told Kelly of a dream he had of money in a glass jar buried by an old stump; that during the conversation testator cried and wrung his hands and waved his arms to such an extent as to scare a team of horses that approached, driven by a lady, so that they wheeled around and started in the other direction and witness was compelled to help her get them under control again. The witness was not asked, and did not state, just what he did with his own horse and buggy during these proceedings. This witness testified he did not think the testator was of sound mind. He is a brother-in-law of appellee's father.

The wife of George Kelly, sister of William Carnahan, also testified that she did not think the testator was of sound mind at the time the will was executed; that she saw him at her house on April 5, 1910, and that the way he talked then she did not know whether he had mental power to know what property he owned or not; that he told her on that day that he had fixed it so that the appellee would get everything.

Mr. and Mrs. George Morgan testified that they lived near the home of testator; that on, or a day or two before, the fourth of April (they could not fix the date with certainty) the testator visited them at their home and was complaining bitterly of William Carnahan; that he was also complaining of his forehead. Mrs. Morgan testified that what he said did not sound sensible, and that it sounded "like a man that was insane." Her reason for this belief was, apparently, that he stated he was not going to stay any longer on his farm because Carnahan did not want him

around, and that she thought this sounded like an insane man. Both she and her husband testified that he said he had had trouble with Carnahan about plowing the garden, and other things. Both of them stated that they did not think he was of sound mind on the day in question.

Some of the witnesses for the appellee testified to additional details as to what they alleged were the testator's peculiarities about the time the will was executed. Two of them stated they heard him talking aloud to himself about his property when confined to his bed with *la grippe*, the winter previous to the execution of the will. Others testified as to his worrying over business affairs on the ground that some money he had loaned was not paid according to agreement, and that he expressed a fear he would not have enough to live on in his old age. Several witnesses also stated that the testator told them he was worrying as to the future life of his daughter, until he found something, by studying the Bible, with reference to a woman dying in childbirth that greatly relieved him.

We have set out, in the main, the substantial facts relied on by counsel for appellee to show the mental incapacity of the testator. It is urged that he was possessed of insane delusions. The principal grounds relied on to support this argument were his proposal of marriage to the two women, Mrs. Halbrook and Miss Hoover, his alleged unreasonable prejudice toward his son-in-law, William Carnahan, and his extreme excitability when talking about his daughter's death and other matters of great interest to him.

Infirmity from old age does not render a person incapable of making a will, unless such infirmity has so far impaired the testator's mind that he is incapable of understanding his business at the time he is engaged in making the will. (*Schmidt v. Schmidt*, 201 Ill. 191.) To sustain an allegation of want of testamentary capacity something more must be shown than mere physical disease and old age on the part of the testator. (*Woodman v. Illinois Trust*

and Savings Bank, 211 Ill. 578, and cases cited; *Waters v. Waters*, 222 id. 26.) An insane delusion which will render one incapable of making a will is difficult to define. This court has said that it is a belief in a state or condition of things in the existence of which no rational person would believe. (*Schneider v. Manning*, 121 Ill. 376; *Snell v. Weldon*, 243 id. 496.) Again, it has been stated that an insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the individual, which refuses to yield either to evidence or reason. (*Scott v. Scott*, 212 Ill. 597; *Drum v. Capps*, 240 id. 524; *Louby v. Key*, 258 id. 558.) Prejudice of the testator against a relative is not ground for setting aside a will unless it can be explained upon no other ground than that of an insane delusion. A person may be prejudiced against some of his children or persons who are the natural objects of his bounty and make unfair remarks about them without having a proper foundation for his conduct, but it does not necessarily follow that he is without testamentary capacity. Unreasonable prejudice against relatives is not ordinarily ground for invalidating a will. That can only be done when the testator's aversion is shown to be the result of an insane delusion, his conduct not being able to be explained on any other ground. (*Nicewander v. Nicewander*, 151 Ill. 156; *Schmidt v. Schmidt*, *supra*; *Scott v. Scott*, *supra*; *Snell v. Weldon*, 239 Ill. 279; *Drum v. Capps*, *supra*.) An unequal division of testator's property among his heirs does not, of itself, justify the court in holding that testator did not possess testamentary capacity. The testator has the undoubted right to dispose of his property as he thinks best, and the fact that it is unequally divided among those who have claims on his bounty does not impair the validity of the will. It is only a circumstance which the jury may consider, in connection with other evidence, in passing upon the soundness of mind of the testator. (*Cunniff v. Cunniff*, 255 Ill. 407; *Schmidt v. Schmidt*,

*supra.*) It cannot be presumed that the testator is insane merely because his father was insane. Until the disease manifests its presence we cannot infer its existence in the mind of the person in question. (*Snow v. Benton*, 28 Ill. 306.) The fact that a person believes in witchcraft, clairvoyance, spiritual influences, presentiments of the occurrences of future events, dreams, mind-reading, and the like, does not necessarily affect the validity of his will. Manifestly, a man's belief cannot be made a test of sanity. When we leave the domain of experience or knowledge and enter upon the field of belief the range is limitless, extending from the highest degree of rationality to the wildest dreams of superstition. What to one man may be a reasonable belief is to another wholly unreasonable. While, under certain circumstances, belief in what men generally understand to be supernatural may tend to prove insanity, it is well known that some of the brightest and clearest intellects have honestly believed in spiritualism and other apparently supernatural influences. (*Whipple v. Eddy*, 161 Ill. 114, and cases cited.) It is the settled law that testamentary capacity cannot be determined, alone, by what one believes, nor by the character of the tales he tells concerning hidden treasure, spirits, spooks and supernatural things. Where the acts of the testator in the conduct of his business affairs and in his ordinary life are uniformly intelligent, rational and reasonable, proof that he has related stories concerning hidden treasures that in no way appear to have influenced him in the execution of his will does not prove testamentary incapacity. (*Wait v. Westfall*, 68 N. E. Rep. [Ind.] 271; *Middleditch v. Williams*, 4 L. R. A. [N. J.] 738.) The fact that the testator shed tears when conversing about his daughter or grew excited when talking about business affairs that were troubling him does not, in itself, prove that he lacked testamentary capacity at the time he executed the will. Whether hardening of the arteries has affected the mind is not a question of what the tendency of that disease

is, but the proof must be as to its effect in the particular case. (*Brainard v. Brainard*, 259 Ill. 613; *Drum v. Capps*, *supra*.) It is difficult to adopt any absolute or fixed rule as to what will constitute insanity in all cases. Temperament, nervous force and physical organization differ in infinite degree, and these may all have a direct or remote influence upon the intellect. While each case must depend in some measure upon its special facts, it is the settled law that a person who is capable of transacting ordinary business is capable of making a valid will; that is, if he is capable of acting in all ordinary affairs he possesses testamentary capacity. The derangement, to incapacitate the person from making a valid will, must be of that character which renders him incapable of understanding the effect and consequences of his act. It must be a want of capacity which prevents him from reasoning correctly and from understanding the relation of cause and effect in ordinary business matters. (*Meeker v. Meeker*, 75 Ill. 260.) That an old man in the condition of the testator, after his daughter's death should want a home and would be looking for a wife and companion certainly cannot, under the circumstances shown in this record, be very strong proof of unsoundness of mind. Such a desire is usually recognized as strong proof of a sane mind. If his home life with his son-in-law was not pleasant,—and the evidence tends strongly to show it was not,—it would be most natural that he should be thinking of how he could bring about proper home surroundings for himself. On this point, however, the character of the evidence tending to prove this desire on the testator's part may well be subject to close scrutiny. All who testified to this fact, with one exception, were relatives of William Carnahan. One of them was his present wife, whose experiences in matrimony, as shown by her own evidence, are certainly not such as to justify any strong reliance upon her statement that such an offer of marriage was proof of an unsound mind.



Counsel for appellee contend that the record shows conclusively that there was no ground for the testator having a dislike for his son-in-law, William Carnahan. A number of the witnesses testified that the testator had said to them that he always got along well with Carnahan and had been treated right by him. Other witnesses, however, some of whom testified for appellee, said positively that the testator claimed that he had trouble with Carnahan. Manifestly, the conditions were such that he did not care to live at his old home, on his own farm, after his daughter's death.

If it be admitted that Dr. Martin is correct as to the date (April 6, 1910,) when he treated the testator for the abscess above his nose, it is most improbable from the evidence in the record that this abscess was causing him severe pain or making him trouble in marked degree on April 4, the day the will was executed. No person testifying for appellee testified that he did or said anything on that day that indicated that he was suffering physically. If the witness George Kelly is correct as to the time when he met the testator on the road to his brother's, and if his testimony is conceded to be correct as to the talk and actions of Bond at that time, it by no means follows that this proves that the testator lacked testamentary capacity on the day in question. The testimony of all the witnesses in the record proves conclusively that for some time before the execution of the will the testator had been up and around and attending to his business affairs; that he was physically able to walk miles by himself; that the son-in-law did not seem to think it was at all improper for the testator to leave home at any time he desired; that he went alone, on foot, to Joseph Kelly's house on the day in question, and the four witnesses who were present on that day at that house and talked with him saw or heard nothing that indicated in the slightest degree that he was not as mentally sound and vigorous as would be expected of any man of his age. The evidence also shows conclusively that although he did not

return to his home until the next evening, or later, the son-in-law or his present wife did not think such actions on testator's part were at all out of the way. Furthermore, there is not a scintilla of testimony offered by any witness that after April, 1910, the testator did or said anything that indicated that he was not of sound mind or memory. It is conceded by counsel for appellee that there is no evidence of that character. The witnesses who testified for appellant as to the testamentary capacity of testator were most of them fully as well qualified by long acquaintance with him, and in every other way, to judge of his mental capacity as any of the witnesses for appellee. The great majority of witnesses for appellant were not interested in any manner in this litigation. The same cannot be said as to the majority of the witnesses who testified for appellee. On this record we can reach no other conclusion than that the great weight of the testimony is against the verdict of the jury on the question of the testator's testamentary capacity.

The attesting witness Simpson was asked the question what Bond's appearance was on the day that he signed the will. The witness replied that "he was just that day as he was any other day that I ever saw him." This answer was stricken out by the trial court on motion of counsel for appellee, as was another answer of the same witness that he did not observe any change in testator, and the same ruling was made as to a question asked of the other subscribing witness. The trial court's ruling on this question is in conflict with the rule laid down by this court in *Kellan v. Kellan*, 258 Ill. 256, where we said that it was proper for the witnesses to state that they had not observed any change in the mental condition of the testator; that as witnesses can testify as to the mental condition of the testator before and after the time the will was executed, this would necessarily result in a direct or indirect comparison.

Counsel for appellant insist that the court erred in giving various instructions for appellee. Among others, they

urge that instruction 5 so given was incorrect. That instruction states that the testator, at the time he executed the will, in order to possess the sound mind and memory required by law, must have had "the strength and clearness of mind sufficient to know in general, *without prompting*, the nature and extent of his property, the persons who were the natural objects of his bounty and their relation to him and natural claims upon him, and he must know and understand what he is doing and be able to keep things in his mind long enough to form a rational judgment in regard to them." In view of the nature of the evidence in this record we think this instruction was wrong in using the term "without prompting." There is not the slightest evidence in the record that he required or had any prompting at the time the will was executed. On the contrary, all the evidence as to what he said and did at the time the will was executed showed that he was not prompted in any way. Furthermore, this court has never laid down the rule of law that it was essential that testator should have sufficient strength of mind to know what property he owned "without prompting." So far as we are advised such a rule has never been laid down by any authority. Nothing was said by this court in *Piper v. Andricks*, 209 Ill. 564, that should be construed as holding to the contrary.

Appellee's instruction 10 is also criticised. It stated that the jury were instructed "that while, as a matter of law, Payton A. Bond, if he at the time was of sound mind and memory, had a right to cut off his grandchild, Mary E. Carnahan, (who, had he died without a will, would have inherited all of his property,) with but \$100, and had a right to give the rest of his property to persons who would not have been his heirs-at-law had he died without making a will, yet if, in fact, at the time he made said will he did not possess the sound mind and memory required by law, then he had no right to cut her off with this \$100 and give his property to persons not his heirs." This instruction is er-

roneous in assuming that he gave his grand-daughter only \$100. The will showed that he gave her also the personal property that he owned at the time of his death. Counsel for appellee argue that the testimony shows that this personal property amounted to very little. The record is not at all clear as to its value. But there is a more serious objection to the instruction. The tendency of an instruction so worded would be to cause the jury to think they had a right to decide whether the will was just or unjust as to the various relatives. This court has frequently said in contests concerning wills, where the testator has made, or seemingly made, an unequal or inequitable distribution of his property among those related to him, that there is a disposition in the minds of most men to seek to hold the will invalid; that such an inclination has been found to exist in the minds of most jurors to such an extent that it cannot be controlled by instructions; that while the law is that the testator may make such disposition of his property as he sees fit and may bestow his bounty where he wishes, "the common mind is disinclined to recognize it, and jurors will too frequently seize upon any pretext for finding a verdict in accordance with what they regard as natural justice." (*Nieman v. Schnitker*, 181 Ill. 400, and cases cited.) The jury has nothing to do with the equity or inequity of the will. (*Rutherford v. Morris*, 77 Ill. 397.) Appellee had no property rights in testator's property and therefore could not be deprived or "cut off" from them. Instructions similar to this were held error in *Brainard v. Brainard*, *supra*, and *Rowcliffe v. Belson*, 261 Ill. 566.

Instruction 8 given for appellee was also erroneous in telling the jury that if the testator "at times had attacks of mental derangement, anger and jealousy, which, while the attacks were upon him, rendered him, during their continuance, of unsound mind and memory," and if they believed, from the evidence, that at the time he executed the purported will he was suffering from one of these attacks, they

should find the will not valid. There is no evidence that at the time he executed the will at the house of Joseph Kelly he was moved by anger or jealousy or was suffering from one of these attacks.

Counsel for appellant argue that several other instructions given for appellee were erroneous. While they may be subject to criticism in some particulars along the same lines as the instructions already referred to, we do not deem them so misleading as to require consideration at our hands.

What has already been said, together with what is laid down in the cases cited in this opinion, indicates clearly the general rules of law that should govern in the trial of a case of this character. To discuss in detail all of these various questions raised would be to unduly extend this opinion, already too long.

The decree of the circuit court must be reversed and the cause remanded to the circuit court for further proceedings not in conflict with the views herein expressed.

*Reversed and remanded.*

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THE PEOPLE *ex rel.* Robert Hewitt, County Collector, Appellee, *vs.* THE CHICAGO, INDIANA AND SOUTHERN RAILROAD COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—*district road tax levied after law was repealed is invalid.* A district road tax not levied until after the law authorizing it had been repealed is invalid.

2. SAME—*a county board has power to levy tax for State aid roads.* A county board has power to levy a tax to raise money for State aid roads. (*People v. Kankakee and Seneca Railroad Co. ante*, p. 497, followed.)

APPEAL from the County Court of Kankakee county; the Hon. A. W. DESELM, Judge, presiding.

W. R. HUNTER, (BERTRAND WALKER, of counsel,) for appellant.

WAYNE H. DYER, State's Attorney, for appellee.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This was an application in the county court of Kankakee county for judgment and order of sale against the Chicago, Indiana and Southern Railroad Company for certain taxes of 1913 alleged to be delinquent. Objections were filed to that part of the county tax levied for State aid roads and to the district road taxes levied in the town of Norton, in said county. The objection to the levy for State aid roads is that the county board had no authority to levy such tax. The objection to the road taxes levied in the town of Norton is that the law under which said taxes were levied was repealed by the general revision of the Road law which went into force July 1, 1913, and that said tax was not levied until in September after the repealing act went into force. These objections were both overruled and appellant has perfected an appeal to this court.

Appellee concedes in the brief filed in this court that the objection to the district road taxes in the town of Norton is a valid objection and that the same should have been sustained. The repeal of the law prior to the levy of the tax puts an end to the power to levy the same, and this objection should have been sustained. *People v. Toledo, St. Louis and Western Railroad Co.* 249 Ill. 175.

The objection to the tax levied for State aid roads is the same objection that has received the consideration of this court in *People v. Kankakee and Seneca Railroad Co.* (*ante*, p. 497.) For the reasons given in that case the objection to this tax was properly overruled.

The judgment of the county court will be affirmed in so far as it affects the State aid road tax and reversed as to the district road tax of the town of Norton.

THE PEOPLE *ex rel.* Joseph L. Thomas, County Collector,  
Appellee, vs. THE WABASH RAILROAD COMPANY, Ap-  
pellant.

*Opinion filed December 16, 1914.*

1. TAXES—*the county board may levy tax for State aid roads.* Raising money for a county's share of the expense of building State aid roads has been made a county purpose by the Roads and Bridges act of 1913, and the permissive language of section 22 of such act with reference to applying funds on hand or voting to issue bonds does not exclude the exercise by the county board of its general power to levy taxes for such purpose. (*People v. Kanakee and Seneca Railroad Co. ante*, p. 497, followed.)

2. SAME—*county board still has power to aid in construction of bridges aside from section 35 of the act of 1913.* Section 35 of the Roads and Bridges law of 1913, which embodies the provisions of the act of 1877, has merely taken away the discretion of the county board, under certain conditions, to refuse to aid towns in constructing bridges by making such aid compulsory, but it has not deprived the county board of power to furnish, under other conditions, such aid to towns in the construction of bridges as it may deem expedient, under the authority of section 56 of the act relating to counties.

APPEAL from the County Court of Adams county; the Hon. LYMAN MCCARL, Judge, presiding.

J. L. MINNIS, N. S. BROWN, and WILSON & SCHMIEDSKAMP, for appellant.

JOHN T. INGRAM, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The county court of Adams county overruled objections of the appellant to the application of the county collector for judgment and order of sale for two items of the county taxes,—one of \$5000 for the construction of State aid roads and the other of \$11,000 for bridges,—under section 56 of chapter 34 of the Revised Statutes. Judgment with order of sale was entered and an appeal was taken.

The objection to the item of \$5000 for State aid roads was the same which was made in several other cases brought to this court by appeal, and was that the only methods by which county boards could provide funds for State aid roads were specified in section 22 of the Road and Bridge law, by appropriating funds in the county treasury or submitting to the legal voters the question of issuing bonds. Raising money for the county share of the expense of making State aid roads has been made a county purpose, and the permissive language of section 22 does not exclude the exercise of the general authority to raise taxes for such purposes. Accordingly we held in *People v. Kankakee and Seneca Railroad Co.* (*ante*, p. 497,) that a tax levied by the county board for State aid roads is legal. It was not error in the court to overrule the objection to that tax.

Included in the appropriation and tax levy there was an item of \$4000 for bridges under section 35 of the Road and Bridge law, which requires the county board, under certain conditions, to contribute one-half the expense of constructing bridges. No objection was made to that item, but it is contended that the levy of \$11,000 for bridges under section 56 of chapter 34 of the Revised Statutes was unlawful. The question raised is whether county boards still have a discretionary power to aid in the construction of roads and bridges aside from the compulsory provision of section 35 of the Road and Bridge law. The rule of the common law and the history of legislation on the subject will lead to the conclusion that they have such discretionary power. In the case of *People v. Canal Trustees*, 14 Ill. 402, the court said that unquestionably by the common law and by our own statutes the burden of constructing and maintaining bridges rested upon the counties, and in *Dennis v. Maynard*, 15 Ill. 477, it was again declared that by the common law the burden was upon the counties unless it had been placed elsewhere, but the burden might be divided between the county and smaller municipal divi-



sions, as the legislature might think proper. It had been previously declared in *Eyman v. People*, 1 Gilm. 4, that the act of February 3, 1835, (Laws of 1835, p. 130,) gave the county commissioners' courts of the several counties general superintendence over public roads, and the act of January 18, 1836, (Laws of 1836, p. 207,) gave to the county commissioners' courts discretionary power to expend on the public roads, in making causeways, bridges, etc., a certain proportion of the money in the county treasury. In 1861 the subject of roads and bridges was included in the act authorizing township organization. (Laws of 1861, p. 236.) Section 6 of article 14 of that act authorized boards of supervisors to appropriate funds to aid in the construction of roads and bridges in any part of their respective counties when a majority of the whole board of the county might deem it proper and expedient. This invested the board of supervisors in counties under township organization with the same discretionary power which county commissioners' courts had in aiding towns in the construction of roads and bridges. In the revision of 1874 the subjects of counties and of roads and bridges became separate chapters, and the provision of section 6 of article 14 was transferred in the same words to chapter 34, relating to counties. This provision remains in the law, and gives to county boards a discretion to aid any town in the construction of roads and bridges, upon condition that a majority of the whole board deem it proper and expedient. Manifestly, it was intended to permit county boards to aid towns in the construction of roads and bridges where their construction and maintenance would be burdensome to the taxpayers of the locality. While the burden may be imposed upon towns, the use of highways and bridges is for all the people of the county and the State at large. Some towns require but little money for roads and bridges, while others, on account of the topography of the locality and the existence of large rivers or numerous streams and water-

courses, are heavily burdened, not solely for their own benefit but for the benefit of the public at large. It is evident that the General Assembly intended that the cost of expensive roads and bridges might, in the discretion of the county board, be distributed throughout the county, and the extent of the aid which may be given is not limited in any way. In 1877 it was deemed wise to fix certain conditions under which the county board would have no discretion but must appropriate one-half of the necessary funds to build a bridge. (Laws of 1877, p. 193.) The mandatory requirement is now section 35 of the Road and Bridge law, and its purpose is to take away from the county board all discretion to refuse aid under the specified conditions. Section 35 compels aid to a certain amount where the cost of the bridge shall be more than twelve cents on the \$100 on the latest assessment roll and the levy of the road and bridge tax has been the full amount allowed by law. After the act of 1877 became the law the case of *Peoria, Decatur and Evansville Railway Co. v. People*, 116 Ill. 232, was decided by this court. One reason there given for requiring statements of road and bridge taxes to be laid before the board of supervisors was the discretionary power of a board to appropriate funds to aid in the construction of roads and bridges, in the exercise of which power the board should take into consideration the amount of taxes levied for other purposes. The court could not have referred to the mandatory requirement of an appropriation of one-half of the cost of bridges, about which the board was not allowed any discretion. The act of 1877 has only taken away the discretion in particular cases, and has not destroyed the power given to a county board to furnish such aid as may be deemed expedient in other cases. The court did not err in overruling the objection.

The judgment is affirmed.

*Judgment affirmed.*

THE T. E. HILL COMPANY, Appellant, vs. THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellee.

*Opinion filed December 16, 1914.*

1. **BANKRUPTCY**—*Bankruptcy act does not limit right to apply for receiver to a petitioning creditor.* The Federal Bankruptcy act does not limit the right to apply for a receiver to the creditors petitioning for an adjudication of bankruptcy but authorizes such application to be made by any party in interest, which includes any creditor having a provable debt against the bankrupt which would be affected by the discharge in bankruptcy.

2. **SAME**—*appointment of a receiver is ancillary to bankruptcy proceeding.* The petition for an adjudication of bankruptcy and the application for the appointment of a receiver are separate and distinct, and the appointment of the receiver is but ancillary to the bankruptcy proceeding.

3. **SAME**—*purpose of section 3e of Bankruptcy act.* The purpose of section 3e of the Bankruptcy act, requiring a bond by the applicant for a receiver, was to protect the alleged bankrupt from all costs, expenses and damages incident to the seizure of his property, not only up to the time of an appeal from the order, if there be an appeal, but until final adjudication or an order of the court turning back the property.

4. **SAME**—*order dismissing petition for adjudication does not, ipso facto, discharge the receiver.* An order dismissing a petition for an adjudication in bankruptcy does not, *ipso facto*, discharge the receiver appointed on the application of a creditor but the receiver is still amenable to the court, and his functions do not entirely cease until he has been expressly discharged by an order of the court.

5. **SAME**—*bond on appeal from order dismissing petition does not operate as a supersedeas bond.* An appeal bond given on appeal from an order dismissing a petition for an adjudication of bankruptcy does not operate as a *supersedeas* bond, so as to permit the recovery on such bond of damages due to a continuation of the receivership pending the appeal.

6. **SAME**—*continuance of a receivership after order dismissing petition is discretionary with the court.* The continuance of a receivership, after an order dismissing the petition for an adjudication of bankruptcy, rests within the sound discretion of the district court, and the fact that the court recites, in its order denying an application for the discharge of the receiver, that an appeal has been taken from the order dismissing the petition does not operate

to extend the bond given on such appeal so as to cover damages occasioned by the continuance of the receivership.

7. SAME—*bond given on application for receiver is one which covers damages and costs due to receivership.* The bond given under section 3e of the Bankruptcy act upon the application for the appointment of the receiver is the one to which the bankrupt must look to to recover his damages and costs occasioned by the creation and continuance of the receivership.

8. SAME—*bond on appeal from order dismissing petition does not cover damages from continuance of receivership.* The bond given on appeal from an order dismissing a petition for an adjudication of bankruptcy covers the costs and damages incidental to the appeal but does not cover damages and costs sustained by reason of the continuance of the receivership pending the appeal under an order entered after the appeal was taken and perfected denying an application for discharge of the receiver, even though the appeal bond uses the words "all damages and costs."

APPEAL from the Branch "B" Appellate Court for the First District;—heard in that court on appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding.

BUELL, ABBEY & WILLIAMS, and FRED W. BENTLEY, for appellant.

JOHN A. BLOOMINGSTON, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

On September 21, 1905, the Contractors Supply and Equipment Company, W. J. Quan and the E. L. Hasler Company filed their petition in the United States district court for the northern district of Illinois to have appellant, the T. E. Hill Company, adjudged a bankrupt. On the same day the Contractors Supply and Equipment Company, upon its application, secured the appointment of a receiver, who took possession of the property and assets of appellant. On February 10, 1906, the petition to have appellant adjudged a bankrupt was dismissed by the district court.

On February 13 an appeal was prayed from the order dismissing the petition to the United States circuit court of appeals, which was allowed upon petitioners giving bond in the sum of \$5000. On February 20 the appeal was perfected by the filing and approval of the bond, which was signed by the United States Fidelity and Guaranty Company, the appellee here, as surety. On February 13, the day the appeal was prayed and allowed from the order dismissing the petition, William A. Bither was appointed the assignee of the appellant by the county court of Cook county under the Voluntary Assignment act. On the following day, February 14, Bither, as such assignee, made application for a rule on the receiver to turn over to him the property of appellant. On February 23 the district court denied this application. The United States circuit court of appeals thereafter affirmed the order of the district court dismissing the petition to have appellant adjudged a bankrupt. Upon the appointment of the receiver and the seizure of the property of appellant on the application of the Contractors Supply and Equipment Company a bond was required of the applicant, under section 3e of the Federal Bankruptcy act, in the sum of \$5000. Suit was thereafter brought on that bond by appellant and a recovery had for the full amount of the penalty. (*Hill Co. v. United States Guaranty Co.* 250 Ill. 242.) Appellant then brought this suit in the municipal court of the city of Chicago against appellee on the said appeal bond to recover damages sustained by reason of the seizure and detention of its property by the receiver. The trial court rendered judgment for \$5000, the full amount of the penalty of the appeal bond. This judgment was reversed by the Appellate Court for the First District with a finding of facts, and judgment was entered in that court in favor of appellant for nominal damages in the sum of one cent. A certificate of importance was granted, and this appeal followed.

Appellant contends that the appeal bond was a *super-sedeas* bond, which, under the order of the district court, prolonged the receivership, and that the receiver's bond and appeal bond are cumulative, and that the appellee, as surety on the appeal bond, is liable to appellant for the damages sustained by reason of the continuance of the receivership during the pendency of the appeal. Appellee, on the other hand, contends that the three petitioning creditors, for the successful prosecution of whose appeal it became liable, are only liable for the costs of suit, etc., that were incurred in that appeal, and that as the receiver was appointed upon the application of the Contractors Supply and Equipment Company, alone, under section 3e of the Federal Bankruptcy act, any damages which may have been sustained by appellant by reason of the appointment of the receiver and the seizure and detention of its property are recoverable only on the receiver's bond, or from the applicant for the appointment of a receiver, the Contractors Supply and Equipment Company.

Section 59b of the Federal Bankruptcy act provides that three or more creditors, under the conditions therein named, may file a petition to have the debtor adjudged a bankrupt. The third clause of section 2, and section 3e of that act, deal with the appointment of receivers. The third clause of said section 2 provides that the courts of bankruptcy are empowered to appoint receivers or the marshals, "upon application of parties in interest," in case the court finds it necessary for the preservation of the estate, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee has qualified. Said section 3e is as follows:

"Sec. 3e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt, or any part of the same, prior to the adjudication and pending a hearing on the

petition, the petitioner or applicant shall file in the same court a bond, with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses and damages occasioned by such seizure, taking and detention of the property of the alleged bankrupt. If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses and damages occasioned by such seizure, taking or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court and paid by the obligors in such bond."

It will be noted that the act does not limit the right to apply for the appointment of a receiver to any one or more of the petitioning creditors but provides that any party in interest may make application for such appointment. This would necessarily include any creditor who has a provable debt against the bankrupt that would be affected by his discharge in bankruptcy, whether he be one of the petitioning creditors or not. From a consideration of this provision in reference to the appointment of receivers, together with the other provisions of the Bankruptcy act, it is apparent that the petition for adjudication and the application for the appointment of a receiver are separate and distinct and that the receivership proceedings are but ancillary to the proceedings in bankruptcy. The Federal courts have so held. Section 69 of the Bankruptcy act is very similar to the said section 3e, and provides that the judge may, upon satisfactory proof, by affidavit, that the bankrupt against whom an involuntary petition is pending has committed an act of bankruptcy and is neglecting his property, issue a warrant to the marshal to seize and hold the property subject to further orders, upon the application for

such warrant and entering into such bond as the judge shall require. In the case of *In re Kelly*, 91 Fed. Rep. 504, it was held that the proceedings for such warrant and any execution thereof are separate and distinct from the petition in bankruptcy and must be prosecuted by a separate petition. In passing upon this question the court there said: "Under section 69 of the act the warrant of seizure can only issue after a petition by creditor has been filed, and possibly not until notice of it has been given, though we need not determine that point now, but the implication of the statute is that it is altogether a separate proceeding. The same implication appears from section 3e of the statute, which seemingly is quite identical with section 69 in respect of the matter of seizure of the alleged bankrupt's property *pendente lite*. To avoid all confusion they ought to be separated in practice, whether it is required by the statute or not. The separation will serve a useful purpose of calling attention of the parties to the fact that the seizure is a subsequent and independent procedure, which is not necessarily a part of the proceedings in bankruptcy." This decision was followed in the case of *In re Ogles*, 93 Fed. Rep. 429.

In the matter of adjudging the costs and expenses of a receivership the Federal courts have uniformly proceeded upon the theory that the application for the appointment of a receiver is separate and distinct from the bankruptcy proceedings. In the case of *In re Ashenbach Co.* 183 Fed. Rep. 305, it was held that there was abundant authority for the order compelling the petitioning creditor, who alone applied for the appointment of a receiver, to pay all costs and expenses of the receivership upon the dismissal of the petition for adjudication and a vacation of the receivership. In that case the court followed the holding in the case of *In re LaCov*, 142 Fed. Rep. 960.

Ample provision is made for the protection of the bankrupt by said section 3e, which expressly provides that the



bond required shall cover "all costs, expenses and damages occasioned by said seizure, taking and detention of the property of the alleged bankrupt." In construing the language of this section it was said in the case of *In re Spaulding*, 150 Fed. Rep. 120: "The fact that the second paragraph provides that all costs, etc., shall be allowed, is based upon the assumption that a bond will be taken large enough to cover all costs." In *In re Haff*, 135 Fed. Rep. 742, referring to the provisions of these sections of the Bankruptcy act, it was also said that it was the obvious purpose of the act to require indemnity to be given to an alleged bankrupt before his property should be taken from his possession, and to spare him the expense and trouble of seeking other remedies by requiring the party or parties who seek to dispossess him of his property in advance of an adjudication, to furnish him with the security adequate for his complete protection. It is the evident purpose of this statute to protect the alleged bankrupt from all costs, expenses and damages incident to the seizure of his property,—not only up to the time of appeal, if there be an appeal, but until final adjudication or an order of the court turning back the property. In fact, if no bond should be given under said section 3e, or if a bond be given and it proves to be inadequate, the applicant for the appointment of the receiver would still be liable, and, independent of the bond, he could be compelled to pay the costs and expenses of the receivership. Upon the appointment of a receiver on the application of a creditor the alleged bankrupt can be indemnified only by the provisions of said section 3e, and the bond there required to be given is the only one he can look to to recover his damages and expenses upon the discharge of the receiver. If at any time it became apparent that the bond given upon the application for the appointment of the receiver was insufficient and not ample to indemnify appellant for all damages which might grow out of the seizure and detention of his property, he

had the right to apply to the court to require the creditor who had secured the appointment of the receiver to give an additional and sufficient bond.

The contention of appellant that the appeal bond operated as a *supersedeas* bond, which, under the order of the court, prolonged the receivership, is not sound. The order of the district court dismissing the petition for adjudication did not, *ipso facto*, discharge the receiver. The functions of the receiver, as between the parties in interest, cease with the final termination of the petition for adjudication. The receiver is still amenable to the court, however, and his functions do not entirely cease until he has been expressly discharged by order of the court. In this case the receiver was not discharged or the receivership in any way terminated, and no occasion had arisen which would require a *supersedeas* bond, if it were possible to require one in any event. The receiver not having been discharged there was nothing to be superseded. If it were permissible to make an appeal bond, in such a case as this, operate as a *supersedeas*, then had the order dismissing the petition for adjudication operated, *ipso facto*, as a discharge of the receiver, or had he been discharged by express order of the court, there might have been occasion for such a bond in order to continue the receivership pending the appeal.

Appellant places great reliance upon the fact that in denying the application of Bither to discharge the receiver the court entered the following order on February 23, 1906: "This matter coming on to be heard upon the motion of William A. Bither, assignee of said T. E. Hill Company, for an order upon the receiver herein to turn over to him all the assets belonging to the said bankrupt estate now in his possession, come the parties by their solicitors, and it appearing to the court that an appeal has been allowed from the order heretofore entered herein dismissing the petition of the petitioning creditors, it is ordered by the

court that said motion be, and the same is, hereby overruled and denied, without prejudice to a renewal of the same in the event said appeal shall not be prosecuted with effect." The receivership matter being an ancillary proceeding entirely separate and distinct from the bankruptcy proceeding, it rested within the discretion of the district court to discharge the receiver or continue the receivership upon the appeal to the circuit court of appeals. It is of no importance that the court, in denying the application for the discharge of the receiver, recited the appeal which had been taken by the petitioners in the bankruptcy proceedings from the order dismissing the petition. The petition had been dismissed on February 10 and an appeal from that order had been prayed and allowed on February 13. This appeal was perfected by the filing of the bond required on February 20. The application for the discharge of the receiver was not made until February 14, the day after the appeal had been prayed and allowed, and was not passed upon until February 23, three days after the appeal had been perfected. Leaving out of consideration the fact that these proceedings are separate and distinct, there is nothing in the record allowing the appeal and in denying the application for the discharge of the receiver which indicates that it was intended by the court or the parties that the appeal bond should cover the expenses and damages occasioned by a continuation of the receivership.

Counsel point out that the amount of the penalty of the bond should be taken as an indication that the bond was meant to cover more than the ordinary costs and expenses of an appeal, but it must be borne in mind that the amount of this bond was fixed on February 13, the day before the application was made for the discharge of the receiver and ten days before the court denied that application.

Counsel also rely upon the fact that the condition of the appeal bond was, that if the petitioning creditors should prosecute their appeal with effect and answer "all damages

and costs" if they failed to make their plea good, then the obligation was to be void, otherwise to remain in full force and virtue. We do not attach the significance to the words, "all damages and costs," that counsel do. These words were no doubt intended to mean such damages and costs as were incidental to the appeal, and cannot be construed to mean any damage occasioned by the seizure or detention of appellant's property in the matter of the receivership. Appellant made no attempt in the trial court to prove the amount of the costs and expenses incurred upon the appeal from the district court to the circuit court of appeals, but sought to recover only for such damages as it sustained by reason of the continuance of the receivership.

The judgment of the Appellate Court was proper and is affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* O. B. Wysong, County Collector, Appellee, *vs.* THE WABASH RAILROAD COMPANY *et al.* Appellants.

*Opinion filed December 16, 1914.*

1. TAXES—a county board may levy a tax for State aid roads. A county board may levy a tax for State aid roads under its general power to levy taxes for county purposes, and is not limited to the methods prescribed in section 22 of the Roads and Bridges act of 1913 for raising the money for such roads. (*People v. Kankakee and Seneca Railroad Co. ante*, p. 497, followed.)

2. SAME—what does not render tax for State aid roads illegal. The fact that there may be money in the county treasury available for State aid roads does not necessarily render illegal a tax levy for State aid roads, as it is the duty of a county board to use sound business judgment in the levying of taxes so that the county credit will not be impaired.

APPEAL from the County Court of Vermilion county; the Hon. LAWRENCE T. ALLEN, Judge, presiding.

LINDLEY, PENWELL & LINDLEY, (N. S. BROWN, and WALTER C. LINDLEY, of counsel,) for appellants.

JOHN H. LEWMAN, State's Attorney, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court :

This is an appeal from a judgment of the county court of Vermilion county overruling objections to that portion of the county tax for the year 1913 for State aid roads.

The county tax in question was levied by virtue of a resolution of the county board, including as one of the items an amount for State aid roads. The objection of appellants was, that the only methods by which said funds could be provided for State aid roads were those mentioned in section 22 of the Road and Bridge law, either by an appropriation from funds in the county treasury or by submitting to a vote of the people the question of issuing bonds for that purpose. This question has received the consideration of this court in *People v. Kankakee and Seneca Railroad Co.* (*ante*, p. 497.) For the reasons stated in that case the objection urged here that the money could not be raised by the levy of a tax without a vote of the people was properly overruled by the trial court.

The certificate of the judge as to the questions of law involved states that "the evidence showed that at the time of said levy, and at all other times up to and including July 1, 1914, the county treasurer had in his hands, as a part of the county funds, a sum of money more than sufficient to satisfy an appropriation of \$23,000 for State aid roads available for that purpose or for any other legal purpose." It is argued that as this money was in the county treasury the county board was without authority to levy an additional tax. Conceding that the money in the county treasury might have been available for State aid roads that would not necessarily render the tax illegal. It is the duty of the county board to use sound business judgment in the

levying of taxes so that the county credit will not be impaired. Under the reasoning in *People v. Atchison, Topeka and Santa Fe Railway Co.* 261 Ill. 33, this court cannot say there was a clear abuse of the discretionary power of the county board in levying the taxes here in question.

The judgment of the county court will be affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* Robert Hewitt, County Collector, Appellee, *vs.* THE CINCINNATI, LAFAYETTE AND CHICAGO RAILROAD COMPANY, Appellant.

*Opinion filed December 16, 1914.*

This case is controlled by the decision in *People v. Chicago, Indiana and Southern Railroad Co.* (ante, p. 528.)

APPEAL from the County Court of Kankakee county; the Hon. A. W. DESELM, Judge, presiding.

W. R. HUNTER, (L. J. HACKNEY, of counsel,) for appellant.

WAYNE H. DYER, State's Attorney, for appellee.

Per CURIAM: This is an appeal from a judgment of the county court of Kankakee county overruling appellant's objections to a tax levied for State aid roads and to a district road tax levied in the town of Norton, in said county. The record is the same and the objections are the same objections made in *People v. Chicago, Indiana and Southern Railroad Co.* (ante, p. 528.) For the reasons there stated the judgment is affirmed as to the State aid road tax and reversed as to the district road tax of the town of Norton.

*Affirmed in part and reversed in part.*

HATTIE J. BROWN, Appellant, vs. EDWARD M. BROWN,  
Appellee.

*Opinion filed December 16, 1914.*

DIVORCE—*condonation is upon condition that offenses will not be repeated.* Condonation by the wife of acts of cruelty upon the part of the husband is upon the condition that he will not repeat them and depends upon future good usage and conjugal kindness, and he cannot justify his acts of physical violence on the ground that the wife had a high temper and an active and vigorous tongue.

APPEAL from the Circuit Court of Cook county; the  
Hon. RICHARD S. TUTHILL, Judge, presiding.

CHYTRAUS, HEALY & FROST, and EDWIN W. MOORE,  
for appellant.

DANIEL ANDERSON, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion  
of the court:

The circuit court of Cook county, on hearing the evidence, dismissed the bill which appellant, Hattie J. Brown, filed against her husband, the appellee, Edward M. Brown, for divorce, the care and custody of their son, about twelve years old, and to compel the defendant to convey to her all right, title and interest held of record by him to the property described in a deed, in which it was alleged the defendant by fraud, and without her knowledge, procured his name to be inserted as one of the grantees. An appeal from the decree was taken to the Appellate Court for the First District, and the cause was transferred to this court because a freehold was involved.

The witnesses appeared and testified before the court, so that he had an opportunity, which is denied to us, to judge of their credibility so far as there was any dispute

between them concerning the facts, but there was practically no such dispute. While the defendant offered excuses for his acts, and interpreted them, and the causes of them, in some instances differently from the complainant, he made no denial of the facts. The parties were married at the home of the complainant in Pleasantville, Iowa, on January 9, 1900, and after the marriage they came to Chicago. The complainant belonged to a family in very good circumstances and the parties had been betrothed for ten years. On the way to Chicago he told her that he had lived with a married woman two and a half years and they had a child; that finally she and her husband separated and she wanted him to live with her but he would not do it; that she was a poor woman with two children and he did not want to burden himself with two children, and that he would rather marry a woman with some money back of her, so that he could live without working. His belated confession, made after the marriage, when it was too late for her to refuse to enter into it, he said was due to his conscience hurting him a little bit and his effort to ease his conscience by confiding the facts to her. Naturally the result was not favorable to a harmonious married life. They lived in Chicago in a four-room basement flat, rented for \$10 a month, and afterward in a five-room flat, for which they paid \$13 a month. In 1901 the son, Donald, was born. In 1902 the defendant was afflicted with a disease which is contracted from immoral relations, and which he claimed was a consequence or recurrence of a disease contracted eight years before the marriage. In 1905 the complainant's father died, and she inherited as her share of the estate \$27,000, and she then bought the flat-building, in which they occupied one of the flats as their home. The purchase price was \$6320, subject to an encumbrance of \$3500, and she paid the difference of \$2820. The deed was to be made to her, and she supposed it was so made until she received it by mail after it had been recorded.



Her husband secretly told the draughtsman to make the deed to both of them as joint tenants and not as tenants in common, and it was so made through his fraud. When she found out how the deed was made she tried to have him rectify the wrong, but he refused to do it. His reason for the secret instruction, given at the trial, was, that in case of the death of one the survivor ought to have the property, and he thought it was pretty hard if he could not have as much as one-tenth of her inheritance. The relations of the parties as husband and wife were never pleasant, and after the fraud on his part they became much worse. He was in the habit of telling her how homely she was, and of saying that she had a sweet-potato nose and pop-eyes, which he said, at the hearing, was a method of joking that he had. It was also his habit to call her vile and vulgar names not fit to be printed, and to swear at her. He accused her of adultery with the family doctor and admitted on the trial that he had no cause for his charge. When she spoke of another man in a friendly way he immediately became jealous and said that he would have her watched. There were three instances of physical violence on his part, the first of which occurred in December, 1905. There was a quarrel about his taking the boy out in the forenoon when she intended to take him to a matinee in the afternoon. At that time he shoved and pushed her around from room to room and bruised her, and during the physical contest she broke a plate over his head. Two years later there was a similar occurrence, not of much importance but such as to leave marks of physical injuries. On the night of December 23, 1911, the third combat took place. He came home from a lodge at half-past eleven and was locked out, and after she let him in he got hold of her arms, pushed her down on her knees and bent her back over the bed, after which she attacked him with a slipper. He was always a failure as a money earner and business man, and after she received her money he contributed prac-

tically nothing to the support of the family. He had been in the stereoscopic view business and made a failure of it, and in a venture in Colorado he used \$1500 inherited by himself and borrowed \$1000 from her, all of which was lost. He sat in saloons much of his time and came home at very late hours at night and was lacking in thrift and business ability. At the hearing he attributed their troubles to her dissatisfaction concerning money matters, and explained that his conduct and language were due to his becoming very angry and exasperated on account of her language to him. She had a very high temper and an active and vigorous tongue, but that fact did not afford a sufficient excuse for his acts of physical violence. He attempted to excuse what he did on the night of December 23 by claiming that she was the aggressor and that he was only endeavoring to restrain her. Her wrists were discolored the next day, and the injury appears to have been more than would naturally have been occasioned by mere efforts to prevent her from assaulting him. It is evident that she had no respect for him at any time after his disclosure made on the way to Chicago, and especially after the fraud concerning the deed she had no regard for him. Their marital relations practically ceased, and if there was any condonation of the earlier offenses it was upon the condition that he would not repeat them and depended upon future good usage and conjugal kindness. (*Sharp v. Sharp*, 116 Ill. 509.) Considering the undisputed facts, the complainant was entitled to a divorce and to have the fraud in having the deed made as it was made, rectified.

The decree is reversed and the cause remanded.

*Reversed and remanded.*

THE PEOPLE *ex rel.* J. M. Krebs, County Collector, Appellee, *v.s.* THE JACKSONVILLE AND ST. LOUIS RAILWAY COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—the methods of providing funds for State aid roads specified in section 22 of act of 1913 are not exclusive. The methods of providing funds by a county for State aid roads, as specified in section 22 of the Roads and Bridges act of 1913, are not exclusive, and the county board has power, under its general authority to levy taxes for county purposes, to levy a tax to raise the funds for State aid roads.

2. SAME—purpose of section 22 of Roads and Bridges act of 1913. Section 22 of the Roads and Bridges act of 1913, instead of being intended to confer power upon county boards to levy taxes to raise funds to aid in constructing State aid roads, was designed to point out the manner in which the county funds might be appropriated for State aid roads and become a separate fund, as provided in section 23 of such act.

3. SAME—the county board may levy tax for State aid roads though no final allotment has been made. The authority of the county board to levy a tax to raise money for State aid roads under its general powers of taxation is not dependent upon the question whether or not there has been a final allotment by the State highway commission of the county's portion of the State funds.

4. SAME—road district tax levied as a tax on land after July 1, 1913, is invalid. A road district tax attempted to be levied as a tax against land on the overseer's delinquent list after the repeal by the act of 1913 of the law authorizing such levy is invalid, as the repeal of the law put an end to the power to levy the tax.

5. SAME—when road and ditch damage tax is excessive. Under the statute no tax can be levied as a road and ditch damage tax until the amount of damages has been agreed upon, and a levy of such a tax for more than the amount so agreed upon is illegal and void as to the extent of the excess.

CARTWRIGHT, C. J., dissenting.

APPEAL from the County Court of Clinton county; the Hon. JAMES ALLEN, Judge, presiding.

BUNDY & WHAM, and NOLEMAN & SMITH, (J. A. CONNELL, of counsel,) for appellant.

HUGH V. MURRAY, State's Attorney, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This is an appeal by the appellant, the Jacksonville and St. Louis Railway Company, from a judgment and order of sale entered in the county court of Clinton county against its railroad property and rolling stock for delinquent taxes for the year 1913. Upon application being made by the county collector for judgment and order of sale appellant appeared and filed a number of objections, which were sustained except the objections to the following taxes: County tax for State aid roads, amounting to \$179.11; district road tax for East Fork and Meridian townships, amounting to \$229.56, and road and ditch damage tax of Breese township, amounting to \$13.34, all of which were overruled and judgment and order of sale entered against the appellant's property for the amount of these respective taxes. To reverse that judgment this appeal has been prosecuted.

The facts in the case are stipulated, from which it appears that on September 13, 1913, there was \$19,700.87 in the county treasury not otherwise appropriated; that at the September meeting, 1913, the county board of Clinton county made its regular annual tax levy for the ensuing year, including therein an item of \$6100 for county tax for State aid roads. No resolution was passed or steps taken to submit the proposition to a vote of the people. At this time the county board had received notice of the provisional allotment by the State highway commission of \$6088 to Clinton county for State aid roads, and the county board made the above appropriation and levied the tax in question to raise its portion of the funds to be used for that purpose. At this time the State highway commission had sent no certificate of allotment of the State aid roads funds to the county of Clinton, and did not send such certificate until February 5, 1914. September 10, 1913, the day after the appropriation and tax levy were made, the county board

passed a resolution designating certain public highways for State aid roads and forwarded a copy of the same to the State highway commission on September 14, 1913. The roads selected did not meet with the approval of the State highway commission, and at a special meeting of the county board held on January 7, 1914, a new map was made designating roads in the county and forwarded to the State highway commission. At the March, 1914, meeting of the county board a resolution was adopted stating that the public interest demanded the improvement of certain highways set forth therein, and a copy of the same was forwarded to the State highway commission on March 12, 1914. On June 24, 1914, the State highway commission approved the selection of the roads designated in this resolution as State aid roads. In the meantime, on September 11, 1913, the county clerk had notified the State highway commission that the county board had levied a tax to raise funds to pay its portion of the cost of the construction of such State aid roads.

Appellant insists that the county board had no power, under its general taxing powers, to levy a tax to raise funds to meet its portion of the cost of the State aid roads, and that the same can only be raised by the issuance of bonds after a vote of the people, as provided in section 22 of the act of June 27, 1913; (Hurd's Stat. 1913, p. 2117;) and that the tax in question is illegal and void for the further reason that the same was levied before any roads had been selected and designated in the county as State aid roads and a certificate of allotment made by the State highway commission, as provided by that act. Appellant also insists that a county can exercise only such powers as are expressly or impliedly granted to it and as are necessary and essential to carry out its declared objects and purpose; that the act of June 27, 1913, created a new purpose for which the county might raise funds, and that section 22 of the act provides the method by which such funds may be appropri-

ated by the county for that purpose, and that under the holdings of this court in *Chicago, Burlington and Quincy Railroad Co. v. People*, 213 Ill. 458, *People v. Chicago and Illinois Midland Railway Co.* 260 id. 624, and other cases, the method pointed out in section 22 is exclusive, and must be strictly complied with or the tax levied will be illegal and void.

Section 22 of the Road and Bridge law provides as follows: "At any regular or special meeting of the county board held after notice of the decision of the State highway commission to authorize the construction of the proposed improvement as aforesaid, the county board shall determine whether it will authorize the proceedings necessary to enable the county to contribute the one-half of the cost required for the construction of State aid roads as provided in this act. When a county board has once adopted a final resolution providing for the construction or improvement of a highway or a section thereof in accordance with such plans and specifications, no resolution thereafter adopted by such board shall rescind or annul such prior resolution, either directly or indirectly, excepting under the advice and with the consent of the State highway commission. In case the county board desires that such provision be made for the construction of a State aid road, it may proceed in either of the methods following:

"(1) In case there be sufficient funds in the county treasury available therefor, the county board may appropriate therefrom sufficient to meet one-half the cost of the improvement.

"(2) If the county board so desires and deems it necessary for the purpose of the improvement herein authorized, the said county board, in the manner now provided by law for issuing bonds for county purposes, may submit to the legal voters of their county the question of issuing such county bonds. In such case the votes in favor of the proposition submitted shall be 'For County Bonds for State Aid

Roads,' and those against shall be 'Against County Bonds for State Aid Roads.' "

There can be no question but that where the legislature grants the power to levy a tax for a particular purpose and prescribes the conditions under which and the method by which the tax is to be levied, the provisions of the statute must be substantially complied with or the tax levied will be illegal and void, as held in the above cases. Section 22, however, does not confer any additional powers upon the county board with respect to its powers of taxation. On the contrary, it merely points out the manner in which the county board may appropriate county funds for the purpose of and to receive the benefits of that act. Section 22 should be read in connection with the preceding sections 16 to 21, inclusive, which deal with the manner of selecting and designating State aid roads. When so read it will be seen that it does not contemplate any action by the county board until after all of the provisions of the other sections have been complied with,—that is, until after the road has been selected and its desirability, importance and public utility passed upon by the State highway commission, a survey made, and plans and specifications and an estimate of the cost of the proposed improvement made by the State highway engineer and approved by the State highway commission. Then it is that the funds of the county may be appropriated to this purpose, viz., from money on hand raised by general taxation or money raised by issuing bonds for that purpose pursuant to a vote of the legal voters of the county, in the manner provided for issuing bonds for county purposes. By sections 25 and 56 of chapter 34, entitled "Counties," ample power is conferred upon the county board to raise funds for this purpose by general taxation. (Hurd's Stat. 1913, pp. 637, 643.) By clause 6 of section 25 it is provided that the county board shall have power "to cause to be annually levied and collected taxes for county purposes, including all purposes for which money

may be raised by the county by taxation, not exceeding seventy-five cents on the \$100 valuation, and in addition thereto an annual tax not exceeding one hundred cents on the \$100 for the purpose of paying the interest and principal of indebtedness which existed at the time of the adoption of the constitution." By section 56 of the same act it is further provided: "Said board shall have power to appropriate funds to aid in the construction of roads and bridges in any part of the county, whenever a majority of the whole board of the county may deem it proper and expedient." In *People v. Wabash Railroad Co.* (*ante*, p. 530,) we held that under this section county boards have power to aid in the construction of roads. It necessarily follows that a purpose for which the county may appropriate funds is one for which it may properly raise funds by general taxation to meet the expense incurred by such appropriation.

It will thus be seen that, wholly independent of the provisions of section 22 of the act of June 27, 1913, the county board has full power and authority to levy taxes by general taxation for the purpose of aiding in road construction in any part of the county. In our judgment section 22, instead of conferring upon county boards the power to levy taxes to raise funds to aid in road construction, was designed to point out the manner in which the county funds might be appropriated for State aid roads created by that act and become a separate fund, as provided in section 23 of the act. To give to the provisions of this section any other construction would render the first method pointed out by that statute practically nugatory and meaningless, as at the time the act took effect it could not have been contemplated by the legislature that there would be funds in the county treasury available for this purpose. Such a construction is not favored. In construing statutes the cardinal rule is to give effect to the intention of the legislature in adopting the act, and to give its essential provisions such a construction as will render no word, clause or sen-



tence superfluous or meaningless. *Crozer v. People*, 206 Ill. 464; *People v. Kipley*, 171 id. 44.

Our views in this respect are further strengthened by a consideration of the other provisions of this act and the objects and purposes sought to be accomplished by it. By section 15*b* it is provided that if any county shall fail to provide an appropriation of an amount equal to the State allotment within six months from the date of such allotment the amount so allotted shall be forfeited; and by section 15*c* it is further provided that it shall be deemed a sufficient acceptance of the allotment if the county board shall give notice to the State highway commission that it has assessed a tax to raise its portion of the cost, or that it has passed an order submitting to a vote of the people the question of raising an additional tax for this purpose, or that it has passed an order submitting to a vote of the people the question of issuing bonds for that purpose. It does not seem that the legislature would have provided that the county might signify its acceptance of the allotment in the first two ways pointed out, viz., by levying a tax to raise its portion of the cost or by submitting the question of raising an additional tax for that purpose to a vote of the people, if the only way in which the county could raise funds for this purpose was by issuing bonds pursuant to a vote of the legal voters of the county, as provided in section 22. It would be useless for the county to signify its acceptance of the allotment by levying a tax to raise its portion of the costs, if, when the tax was levied, it would be wholly illegal and void for want of power in the county board to levy a tax for that purpose and could not be collected, and we believe the legislature did not intend to so provide. A consideration of the various provisions of the whole act clearly indicates that it was the understanding of the legislature that the county board had the power to raise funds to aid in road construction by virtue of the provisions of sections 25 and 56 of chapter 34, *supra*, and that

its powers in this respect were to be referred to the authority conferred by those sections and not to the provisions of section 22 of the present act. It is therefore wholly immaterial, so far as the validity of the tax is concerned, that at the time the same was levied no final allotment of a portion of the State funds had been made by the State highway commission to the county and that no particular road or roads in the county had been selected and designated as State aid roads. If no such allotment was made and no road or roads selected or designated as State aid roads, the county board still had the power, under the authority conferred by section 56, to appropriate the funds so raised to the aid of road construction in any part of the county that it deemed proper and expedient, so long as the same was not raised as an additional tax for that purpose by a vote of the people or by the issuance of bonds for that purpose. A tax levied for State aid roads is a tax levied "to aid in the construction of roads" in the county, and such a levy is fully authorized by the provisions of sections 25 and 56, *supra*. The objection to this tax was properly overruled.

As to the road tax of East Fork and Meridian townships, these townships prior to July 1, 1913, were operating under what is known as the labor system. At the September meeting, 1913, of the county board the delinquent list of the road district tax from each of the townships was laid before the board and the same was ordered extended as a delinquent road tax against the personal and railroad property of appellant in the county. At the time this action was taken by the county board the act of June 23, 1883, had been repealed by the act of June 27, 1913. (Hurd's Stat. 1913, chap. 121, sec. 169.) The labor tax levied by section 83 of the act of June 23, 1883, did not become a lien on the property of appellant until after the return of the tax delinquent by the overseer to the supervisors, as provided in section 110 of that act, and the laying of the same before the board of supervisors and the

ordering of the same collected by the board of supervisors at their September meeting, as provided by sections 116 and 117 of the act. (Hurd's Stat. 1911, p. 2014; *People v. Chicago and Illinois Midland Railway Co. supra.*) In the latter case it is said: "It is true that the commissioners of highways determine how much money shall be raised and make out the list, but the tax can be paid in labor under the direction of the overseer of highways, and it never becomes a tax against property until the list is delivered by the overseer to the supervisors, sworn to as provided by the statute, and the board of supervisors causes the tax to be levied on the lands returned. Although the rate is fixed by the commissioners, no tax upon lands is levied until the board of supervisors makes the levy, which by the statute must be based on a return of an overseer, sworn to by him. The taxes which are delinquent are those which remain unpaid after demand or notice by an officer having authority to collect them, and by the statute the taxes against lands are to be levied by the board of supervisors against the property shown by the list and affidavit of the overseer to be delinquent. (*People v. Chicago and Eastern Illinois Railroad Co.* 214 Ill. 190.) Where the law prescribes a certain method to be adopted to subject property to the burden of taxation, that method must be substantially complied with before the property can be taken and sold in satisfaction of a tax. Accordingly it was held that if a delinquent list has not been delivered to the town supervisor or placed before the board of supervisors by him or any other person the proceedings cannot culminate in a tax on property." At the time of the meeting of the board of supervisors at which this tax was ordered collected the law authorizing its collection had been repealed, and the same was not levied in accordance with the provisions of the law then in force. In *People v. Toledo, St. Louis and Western Railroad Co.* 249 Ill. 175, we held that the repeal of a tax law put an end to all power to levy a tax, even

in cases already commenced, and that a tax levied under such a law and not in accordance with the law then in force could not be collected. That is precisely the situation here, and the cases of *People v. Toledo, St. Louis and Western Railroad Co. supra*, *People v. Illinois Central Railroad Co. (ante, p. 429,)* and *People v. Chicago, Indiana and Southern Railroad Co. (ante, p. 528,)* are decisive of this question. The objection should have been sustained.

As to the road and ditch damage tax in Breese township, the stipulation shows that the total amount of the tax certified to by the commissioners for this purpose was \$1200, and that up to February 12, 1913, the total amount of damages agreed upon was as follows: Adelheit and Elizabeth Voss \$200; Henry and Theodore Hartland \$900; total, \$1100; and that there had been subscribed by popular subscription, for the purpose of inducing the laying out of the road, the sum of \$200. Appellant's amount of this tax is \$13.34. Appellant contends that the amount realized from the popular subscription should be applied to reduce the amount necessary to be raised by taxation to pay the damages agreed upon, and that the levy was excessive to the amount of \$300. With this contention we do not agree. There may have been other expenses incurred in connection with the opening and laying out of the road, such as grading, removing fences, etc., besides the damages awarded to the land owners, and so far as this record shows the \$200 raised by popular subscription may have been subscribed for paying such other expenses. The act of the highway commissioners in levying a tax for more than the full amount of the damages agreed upon would indicate that such was the fact. In the absence of a contrary showing every presumption is to be indulged in favor of the legality of the acts of the tax-levying authorities. (16 Cyc. 1076; *Peoria, Decatur and Evansville Railway Co. v. People*, 116 Ill. 401; *Chicago and Northwestern Railway Co. v. People*, 174 id. 80; *People v. Keener*, 194 id. 16.) Under sections 13 and

15 of the Road and Bridge act (Hurd's Stat. 1911, p. 1995,) no tax can be levied as a road damage tax until the amount of damages has been agreed upon. (*People v. Cairo, Vincennes and Chicago Railway Co.* 252 Ill. 395; *People v. Chicago, Burlington and Quincy Railroad Co.* 252 id. 482.) When the damages have been agreed upon, as required by that act, the amount is made certain, and the levy of a tax for more than the amount so agreed upon is excessive to the amount over and above the actual amount of damages agreed upon and to that extent is illegal and void. The objection should have been sustained as to the portion of the tax levied on appellant's property in excess of the amount of the \$1100 damages agreed upon.

For the reasons given the judgment must be reversed and the cause remanded, with directions to the county court to sustain the objection as to the road tax in East Fork and Meridian townships and as to that portion of the road damage tax in Breese township levied in excess of \$1100. In all other respects the judgment of the county court will be affirmed.

*Reversed and remanded, with directions.*

MR. CHIEF JUSTICE CARTWRIGHT, dissenting:

I am unable to agree with the conclusion reached in this and other cases at the present term that district road taxes regularly assessed and levied under the Road and Bridge law in force prior to July 1, 1913, could not be afterward collected because of the repeal of the law under which they were levied. In the several towns under the labor system district road taxes were assessed and lists were made and subscribed by the commissioners of highways and filed in the offices of the town clerks under the law in force at the time. That law provided that the commissioners of highways of each town should annually ascertain, as nearly as practicable, how much money must be raised by tax on real and personal property and railroad property for the making and repairing of roads within the limit fixed by the

law, and should levy and assess the same as a road tax against said property. The commissioners were required to make a list for each district, containing a description of each tract of land in the district, and the name of the owner, if known, and the name of the owner of any railroad property, and set opposite each tract of land the valuation thereof, and opposite each valuation should extend the road tax assessed thereon in a separate column. The lists were to be deposited with the town clerk and filed in his office, and the clerk was to make a copy of each list and deliver the same to the respective overseers of highways of the several districts, one copy to contain the real and personal property road tax. It was the duty of the town clerk to post notices of the amount of road tax assessed on each \$100 worth of real and personal estate and that persons interested could pay the same in labor on the highways. Every overseer of highways was to give notice to each person residing in his district against whom a land, railroad property or personal property road tax was assessed, of the time and place when he might appear and pay his road taxes in labor, and it was provided that any person might elect to pay the same to the overseer in money. If the road tax was not paid, either in labor or money, to the overseer, a delinquent list was to be returned and laid before the board of supervisors, and it was made the duty of the board to cause the amount of arrearage of the road tax to be levied on the lands returned.

The Road and Bridge law under which the district road taxes were assessed and levied was repealed by the act which took effect on July 1, 1913, but chapter 131 of the Revised Statutes of 1874 provides that no new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any right accrued or claim arising under the former law or in any way whatever affect any right accrued or claim arising before the new law takes effect, save only that the proceedings there-

after shall conform, as far as practicable, to the laws in force at the time of such proceedings.

At the time the tax lists were made and filed with the town clerks the Road and Bridge law authorized the levy of the tax, which might be paid in labor, and if not so paid should become a tax upon land when levied by the board of supervisors in the manner prescribed by the statute. (*People v. Chicago and Illinois Midland Railway Co.* 260 Ill. 624.) Before July 1, 1913, the several towns had acquired a right to payment of the tax either in labor or money, at the election of the tax-payer, and those who paid in labor were merely satisfying a perfectly legal and valid claim against their land for the amount of the tax. The right to have the tax levied on land by taking the steps required by law had accrued before the present statute took effect, and I do not see how it can be said that the right was not saved under the provisions of chapter 131. The overseers had the collection of the tax in charge, and if it was not paid to them, the duty was enjoined upon the board of supervisors, upon the return of the delinquent list, to cause the amount of arrearage returned to be levied upon the lands returned and to be collected in the same manner as other taxes. The sole objection of the appellant in this case was that the law had been repealed, and there was no objection that the proper steps for the collection of the tax were not taken or were not in conformity, as far as practicable, with the present statute. If the appellant owed the tax on July 1, 1913,—which I think cannot be denied,—the right to it had accrued and the right to collect it was saved by the statute.

The decision in *People v. Toledo, St. Louis and Western Railroad Co.* 249 Ill. 175, does not justify the conclusion that the right to collect the tax was destroyed by the repeal of the statute. In that case the highway commissioners, on March 30, 1909, fixed the amount of the levy at thirty cents on the \$100 but took no steps to levy the

tax, and on April 6, 1909, at the annual town meeting, the labor system was abandoned and the cash system of paying road and bridge taxes was adopted. Afterward, and when there was no law for the levy of a district road tax in the town, the commissioners, on April 20, 1909, fixed the rates to be allowed for labor and made the tax lists and filed them in the office of the town clerk. No tax had been levied under any existing law, and the levy of the tax under the labor system after the township had adopted the cash system was illegal and void. In this case and other kindred cases the tax was levied under an existing law, and the present Road and Bridge law was not adopted until June 27, 1913, only three days before it took effect.

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JOHN JOSEPH, Admr., Defendant in Error, *vs.* THE PEORIA  
AND PEKIN UNION RAILWAY COMPANY, Plaintiff in  
Error.

*Opinion filed December 16, 1914.*

1. NEGLIGENCE—*when question whether the deceased was in the discharge of his duties at time of death is for jury.* In an action against the master for damages for the death of a servant in an accident to which there were no eye-witnesses, if there is evidence tending to show that in the discharge of his duties the deceased was required to get in the position he was at the time of his death it is a question for the jury whether he was in the discharge of his duties at the time, even though there is evidence tending to show the contrary.

2. EVIDENCE—*when it is not reversible error to permit a party to impeach his witness.* Where the plaintiff's witness is asked, on cross-examination, a question which is not proper cross-examination, and is allowed, over objection, to give an answer which is contrary to his testimony on a former trial, it is not reversible error to permit the plaintiff, upon the ground of surprise, to ask the witness, on re-direct examination, if he was not asked a certain question on the former trial and if he did not answer it a certain way, and to prove the question and answer by the court reporter after the witness has stated that he does not remember.



WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. LESLIE D. PUTERBAUGH, Judge, presiding.

FRANK T. MILLER, and JOHN M. ELLIOTT, (STEVENS, MILLER & ELLIOTT, of counsel,) for plaintiff in error.

QUINN, QUINN & McGRATH, for defendant in error.

Mr. JUSTICE FARMER delivered the opinion of the court:

The Appellate Court for the Second District affirmed a judgment of the circuit court of Peoria county against the plaintiff in error for \$5000 for the death of the defendant in error's intestate, Joseph Gibron, and a writ of *certiorari* has been awarded to bring the record before us for review.

The case has been tried twice and a verdict returned for the same amount each time, the trial court having set aside the first verdict.

The deceased was killed in the railroad yards of the plaintiff in error in Peoria, where he was employed as a coal shoveler in unloading cars of coal at a coal chute. This chute consisted of a hopper of steel or sheet-iron set in the ground, seventeen feet long and sixteen feet wide at the top, which was the surface of the ground, and having its sides sloping to an opening three feet square at the bottom, which was seven feet deep. A track was laid across this hopper and the cars used were dump-bottom cars. They were unloaded, after being placed in position over the chute, by opening the bottom of the car. The coal ran out of the three-foot opening in the bottom of the chute and was then elevated by an endless chain of buckets operated by steam power. The method of unloading was to place the car over the hopper in such a position that the front wheels were just outside the edge of the hopper, leaving the body of the car extending over the hopper. In this

position the front half of the car could be emptied into the hopper by opening the bottom, the shovelers, of whom the deceased was one, shoveling the coal out of the end of the car beyond the movable bottom. The car was then shoved along the track until the rear half of the car was over the hopper, when it would be emptied in the same way. After the front end of the car was unloaded the car would be moved forward by "pinching,"—that is, by the use of crow-bars under the rear wheels. The coal, in running out of the car, would run over the edge of the hopper and against the sides of the rails, so as to come in contact with the flanges of the front wheels and prevent the car being pinched forward. The coal shovelers would have to clean off the coal at the front end of the car before undertaking to move it. This they would do with a shovel or broom, and sometimes large pieces would have to be pushed out by hand.

The deceased had been in the employ of the plaintiff in error about thirty days. On the night of December 24, 1910, with two other coal shovelers, he was unloading a car of coal, and about two o'clock A. M. they had finished unloading the front end, which was the north end. He was a Syrian, about twenty-five years old, had only been in this country six or seven months, and had a very limited knowledge of the English language. The two shovelers working with him were Conzick, a fellow-Syrian, and a colored man, named Walker. The conflict in the evidence begins at the point where the three men had finished unloading the north end of the car. Before the south end could be unloaded it was necessary to move the car north a few feet so as to bring the dump-bottom in that end of the car over the hopper. A man named Crozier was weigh-master for plaintiff in error and had immediate charge of the three coal shovelers. He testified that because of cars standing on the track to the north of the car being unloaded there was not room to push the last mentioned car forward so that the south end of it could be unloaded, and

that he told the shovelers to go to the round-house and he would see if he could get an engine to pull the car down. He testified that after the north end of the car was unloaded "we got the men down on the ground and tried to pinch the car and found we could not do it;" that Conley, the round-house foreman, came along and said the car could not be pinched down because there were too many cars ahead of it and that he would have a switch engine come in and pull the car down. Crozier further testified he told the men he would get a switch engine; that they could go to the round-house and eat lunch, and that he would tell them when the car was set. Conley, on cross-examination, and over the objection of defendant in error, testified he told the three coal shovelers and Crozier he would have a switch engine come and move the car so that it could be unloaded and that they could go to the boiler-house until they were notified the car was ready to be unloaded. Conzick was not a witness at the trial. Walker testified at the first trial but was not present at the second. His testimony at the first trial was read to the jury at the second trial. He testified he was working with the deceased the night he was killed, in the capacity of a coal shoveler, and had been working with him for about three weeks. He testified he and another shoveler got out of the car about twenty minutes before the dead body of Gibron was found and said they were going to the round-house to get lunch; that Gibron got out of the car with them and they left him at the car; that Gibron was sober and in a cheerful mood. This was his testimony when placed upon the witness stand by the defendant in error. Later he was placed on the stand by plaintiff in error as its witness, and on direct examination testified he did not know an engine was coming down until after Gibron was killed; that when the three of them got off the car he thought Gibron was going with him and the other shoveler; that the two of them went to the round-house, where they stayed about

twenty minutes; that the other fellow went out and came running back just as the witness passed out of the round-house door; that he went to the track and saw Gibron under the wheels; that his body was lying across the rail, his head and arms hanging on one side and his legs on the other. On cross-examination he testified they intended, when they came back to the car from the round-house, to pinch the car down to where it could be unloaded. In an affidavit made for a continuance at the second trial because of the absence of Walker, it was alleged that if he were present he would testify to certain things, among them that Conley notified the shovelers he would have an engine come and move the car and that they could go to the round-house and wait until they were called. It was admitted the witness would testify as alleged in the affidavit if present, and the affidavit was read to the jury. The testimony of the same witness given on the former trial, when personally present in court, was read to the jury, and there were such discrepancies and contradictions between that testimony and the statements in the affidavit for a continuance that the jury might well attach little weight to the affidavit.

In addition to the testimony of Walker on the first trial that he knew nothing about a switch engine coming to move the car and that it was the intention of the shovelers after coming back from their lunch in the round-house to pinch the car down to a place where it could be unloaded in the hopper, there are other circumstances entitled to be considered as tending to show either that no such notice was given the shovelers or that it was not understood if it was given. Gibron was unfamiliar with the English language, which fact was known to the plaintiff in error's representatives under whom he worked. What followed immediately after the north end of the car was unloaded indicated either that the deceased was not notified the car would be moved by an engine or that if any such notice was given he did not understand it. He remained at the

car and twenty minutes later was found lying across the east rail, dead, the south wheel of the north truck having passed over his body. There was a conflict in the evidence as to whether, in the discharge of his duties, he was accustomed or required to get in the position in which he was found dead. There was evidence tending to show that he was, and other evidence on behalf of the plaintiff in error tended to show the contrary. The proof abundantly showed that in unloading the coal it would run over between the tracks and against the sides of the rails where the flanges of the wheels ran. This would have to be removed before the car could be moved by pinch bars. It was sometimes removed with a broom or a shovel and sometimes with the hands, which required getting under the car. It is impossible to imagine that Gibron would have placed himself in the position in which he was found, for any other purpose than to remove the coal from the tracks in the discharge of his duty unless he intended to commit suicide, which is negatived by proof that twenty minutes before he was found he was sober and in a cheerful mood. There was also proof that deceased was a sober and industrious man, careful and prudent for his safety.

It is insisted by plaintiff in error Gibron could not have been in the place he was for the purpose of removing the coal from the sides of the rail, because the proof showed this had been done and an attempt made to pinch the car north before the shovelers were told to go to the round-house and that an engine would be brought to move the car. It is true, certain witnesses testified to that state of facts, but it is also true that other testimony and circumstances proven tended to discredit that testimony. Upon a consideration of all the evidence we think it was a question to be submitted to the jury whether the deceased, at the time he came to his death, was in the exercise of reasonable care and caution in the discharge of his duties, or whether he was guilty of negligence, and the trial court did not err

in submitting the case to the jury. *Stollery v. Cicero and Proviso Street Railway Co.* 243 Ill. 290.

Conley was first placed upon the stand by defendant in error as his witness and asked what his position was with plaintiff in error at the time of Gibron's death, how long Gibron had been employed by plaintiff in error, what time he was killed and what wages he was receiving. He also testified he gave an order for a switch engine to go to the coal chute, and that it ran in on the track that ran over the coal hopper and on which Gibron was killed. On cross-examination counsel for plaintiff in error started to interrogate the witness about whether he notified anyone that the switch engine was coming to pull the car down and whom he so notified. This was objected to by counsel for defendant in error, but the objection was overruled and the witness testified he told the shovelers they could not pinch the car down because of so many cars being on the track ahead of it, and that he would have a switch engine come and move the cars out of the way and spot the car they were unloading over the hopper and would call them when the car was ready. On re-direct examination he was asked if he testified to the same thing on the first trial of the case, and answered he did not then remember what he then said about telling Gibron that he would send an engine in to move the car. This examination was objected to by plaintiff in error on the ground that defendant in error could not impeach his own witness. Counsel for defendant in error stated he was surprised at the testimony of the witness in view of his testimony at the former trial, and the court ruled that upon that basis he might proceed with the examination. The witness was then asked whether at the former trial he had been asked the question, "Had anything been said to these men with reference to moving that car to the north to be unloaded?" and whether he had answered the question, "No, I did not give any orders for it; the man that runs the coal chute gives those orders." The

witness answered that he did not remember, and defendant in error was permitted to prove by the court reporter, over the objection of plaintiff in error, that on the former trial the question had been so asked and so answered. This ruling is complained of as reversible error. The rule is well established that a party cannot impeach a witness voluntarily called by him, except as that may be incidentally done by proving a state of facts different from that sworn to by the witness in question. (*Chicago City Railway Co. v. Gregory*, 221 Ill. 591.) But that rule is not controlling upon the question here presented. It was not competent cross-examination for plaintiff in error to inquire of the witness as to what notice had been given the three coal shovelers that an engine was coming in to move the car, and the objection of defendant in error should have been sustained if the technical rules of evidence were to be observed. If defendant in error's objections had been sustained plaintiff in error could, by leave of the court, then, or later when it came to the introduction of its testimony, have made the witness its witness for the purpose of testifying to the same matters. In either case defendant in error would have had the right to impeach the witness in the manner permitted by the court in this case. Should the fact that plaintiff in error was permitted to examine the witness as a part of the cross-examination of defendant in error's witness instead of making him its own witness deprive defendant in error of the right to prove that he testified to a different state of facts from that testified to on the former trial? We think neither justice, common sense nor even the technical rules of evidence require a reversal of the judgment upon this assignment of error.

The instructions given were in harmony with our view of the law, and finding no reversible error in the record the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

THOMAS B. CORRIGAN, Appellant, vs. PATRICK RALPH.—  
(MARY RALPH *et al.* Appellees.)

*Opinion filed December 16, 1914.*

1. SPECIFIC PERFORMANCE—*discretion of court in the matter of specific performance is not arbitrary.* While in some measure the enforcement of a contract to convey land rests in the sound discretion of the court, yet such discretion is not arbitrary, and where a valid contract is understandingly entered into between the parties which appears to be fair and contains no objectionable or inequitable features, its performance will be enforced.

2. SAME—*fact that the promisor's wife is not obligated to sign deed does not defeat specific performance.* The fact that a contract for the sale of a farm does not obligate the promisor's wife to join in the conveyance, and that she refuses to join therein, does not defeat the right of the promisee to specific performance as against the promisor.

APPEAL from the Circuit Court of Livingston county;  
the Hon. G. W. PATTON, Judge, presiding.

E. A. SIMMONS, for appellant.

HENRY M. KELLY, and STEVENS R. BAKER, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

This is an appeal from a decree dismissing a bill filed by appellant, Thomas B. Corrigan, against Patrick Ralph, for the specific performance of a contract to convey eighty acres of land.

The bill alleges Patrick Ralph was the owner of the land on September 9, 1909, and on that day entered into a written agreement with appellant to sell and convey to him said land. The contract, the performance of which is sought to be enforced, was dated September 9, 1909, in and by which Patrick Ralph agreed to convey to appellant, in fee simple, clear of all encumbrances, by good and sufficient warranty deed, eighty acres of land described, for



\$13,600. The contract acknowledged the receipt of \$1600 in cash, and it was agreed the balance (\$12,000) "is to be paid in the form of a mortgage or trust deed secured by the above described property, running for a period of five years from March 1, 1910, with interest at five per cent per annum, payable annually, with interest at the rate of six per cent per annum, payable after maturity, annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land subsequent to the year 1910." The contract provided for the forfeiture of the cash payment if appellant failed to comply with his part of the agreement. The contract further provided that Ralph was to furnish an abstract before November 1, 1909, and appellant agreed to furnish, in writing, his objections to it, if any, within thirty days after its receipt. The contract was subject to a lease on the premises running from March 1, 1910, to March 1, 1911. The bill avers that appellant was ready and willing to comply with his part of the agreement, and that on March 1, 1910, he tendered Ralph a note for \$12,000, dated on that day, payable to the order of Ralph five years after date, with interest at five per cent per annum, payable annually, until maturity and with six per cent interest per annum after maturity, and also a mortgage on the premises in the usual and customary form to secure the note; that he also on said March 1, 1910, executed another note for \$12,000 in accordance with the terms of the contract and executed a trust deed upon the premises to secure the same, which note and trust deed he tendered to Ralph in lieu of the mortgage, if he preferred it, but that Ralph refused to comply with his contract and make the conveyance. The bill alleged that by mutual mistake the parties, in drawing the contract, omitted the number of the section, but that the land was in section 14, which was well known to both parties and was intended to be so described in said written contract.

There is a prayer in the bill that the contract be reformed in this respect so as to express the intention of the parties.

Patrick Ralph answered the bill denying he made the agreement to convey the land, and averred that at all times when appellant was endeavoring to buy the land he told appellant and his father that his (Ralph's) wife was not willing to sell and would not join him in the deed; that on September 9, 1909, he (Ralph) was not in a condition to fully know and understand what he was doing about selling the property; that he had been drinking, which fact was known to appellant and his father, but that appellant urged him to agree to the sale, and that appellant and his father urged respondent to force his wife to agree to the sale. The answer further avers that respondent went with appellant and his father to the city of Dwight for the purpose of further discussing the sale of the land; that respondent told appellant he was willing to sell at the price agreed upon if his wife was willing, but if she was not he would make no deal; that the parties went together to the place where the agreement was prepared; that the same was prepared without his advice or suggestion; that he is unable to read or write; that the agreement was not read to him, and that without knowing or being advised of its contents he signed the same by his mark. The answer denies respondent received the cash payment of \$1600, and avers the agreement was made subject to the approval of respondent's wife; that she had at all times refused to agree to the sale of the land, which was well known to appellant, and that the contract was procured by fraud, deceit and misrepresentation of appellant and his father; that it is inequitable and unjust, the consideration inadequate, and that its performance would work an injustice and hardship upon respondent.

After replication filed the cause was referred to the master in chancery to take the proof and report his conclusions of law and fact. The master reported in June,

1910, finding that the contract was valid and binding upon the parties; that by a mistake of the scrivener who reduced the contract to writing the number of the section was omitted, and that by another mistake of the scrivener the contract provided for the payment by appellant of the taxes levied upon said land subsequent to the year 1910, whereas it was intended to provide for the payment by appellant of the taxes levied subsequent to the year 1909. The master recommended that the contract be reformed in these respects to comply with the intention of the parties and that a decree for specific performance be granted as prayed. Objections to the master's report by Ralph were overruled by the master and were renewed as exceptions before the chancellor. After the cause was heard, and before any decree was rendered, Ralph died, and his heirs were made parties by a supplemental bill, brought into court, and at the May term, 1914, the chancellor sustained exceptions to the master's report and entered a decree dismissing the bill for want of equity. Complainant below has prosecuted this appeal to this court.

The decree finds that prior to the execution of the written contract Ralph agreed to sell the land to Thomas J. Corrigan, who is appellant's father, for \$13,600, on condition that Ralph's wife would consent to the sale; that his wife refused to consent to the sale, of which fact Thomas J. Corrigan had knowledge, but afterwards, on the afternoon of September 9, 1909, Thomas J. Corrigan, appellant (his son) and Ralph went to the bank in Dwight, where Charles D. McWilliams was secured by Thomas J. Corrigan to prepare the contract; that Ralph, although not in an advanced state of intoxication, had been drinking, by reason of which and his illiteracy and the apparent haste of the draftsman of the agreement he did not comprehend its contents, but, so far as he understood, thought it was in accordance with the terms upon which he had agreed to sell the land, among which was that the deferred pay-

ment was to bear six per cent interest and that he was dealing with Thomas J. Corrigan and not his son, Thomas B. Corrigan; that Ralph signed the agreement with the understanding that it would be of no force or effect unless his wife joined him in the execution of the deed. The decree finds the contract did not correctly state the terms of the verbal agreement between the parties, that Ralph took no part in dictating or stating the terms and conditions when it was prepared, and that it would be inequitable and unjust to enforce the specific performance of said agreement.

Patrick Ralph had formerly lived on the eighty acres of land in controversy, but for a few years prior to September 9, 1909, he and his wife had resided in the city of Dwight. He was seventy-three years old and could neither read nor write. Thomas J. Corrigan, father of appellant, owned and lived on a farm about four miles from Ralph's farm. Thomas B. Corrigan, appellant, lived on a farm belonging to his father and joining Ralph's farm. The parties were acquainted with each other and there had been some little talk between them about the sale of the land prior to September 9, 1909. On that day appellant and his father went to the Ralph farm, where Ralph was at work. They there (or at least Thomas J. Corrigan and Ralph) talked about the sale, the price and the terms. Ralph got in the buggy with the Corrigans and went to the home of Thomas J. Corrigan and had dinner. After dinner he and Thomas J. Corrigan went together to Dwight, where they met appellant. At the suggestion of Ralph the three went to the bank of which Charles McWilliams was cashier, to have the contract for the sale of the land reduced to writing. McWilliams was not at the bank but was called in, and in the presence of the Corrigans and Ralph dictated to a stenographer the agreement. After it was completed it was signed by Ralph by his mark, which was witnessed by two employees of the bank, and was also signed by appellant. The Corrigans did not have the \$1600 but bor-

rowed \$1000 from McWilliams' bank, which, together with checks cashed, made \$1600. A certificate of deposit was issued for that amount to Ralph by the bank and he left the money in the bank. A day or two after the contract was signed Ralph requested McWilliams to send the abstract to some one to have it brought down to date, and on September 11, 1909, McWilliams sent it to an abstractor at Pontiac for that purpose. Thomas J. Corrigan procured the abstract at the abstractor's office after it was finished and took it to E. A. Simmons, solicitor for appellant in this case, for examination. Simmons prepared a written opinion pointing out a number of objections, none of which were of serious character. Afterwards Ralph called on McWilliams again and asked what he should do about the abstract. McWilliams suggested the names of certain lawyers in Pontiac for him to advise with, but finally advised him that Simmons would probably see to the correction of the objections with as little expense as anyone, and that would be likely to better satisfy Corrigan. Ralph took the abstract to the office of Simmons and inquired the cost of removing the objections to the title. Simmons told him it would not be over \$20 and probably considerably less. Shortly afterwards Ralph again went to Simmons' office and demanded his abstract, which was given to him. On November 15, 1909, Ralph caused a letter to be written to Thomas Corrigan, which was received by appellant. The letter stated it was written to notify the person to whom it was addressed that Mrs. Ralph refused to consent to the sale of the farm, refused to sign any papers connected with the sale, and that it would be impossible for Ralph to sell the land. The letter also stated the \$1600 paid down was at the Bank of Dwight and was to be returned to the person to whom the letter was addressed, and the addressee was requested to call at once and release all papers which had been made out so far, so the money paid could be promptly returned.

We think the weight of the proof abundantly shows that Ralph understood and comprehended the agreement when it was made; that he was not in an advanced stage of intoxication; that if he was intoxicated at all, it was in so slight a degree that none of the parties present when the agreement was executed could detect it. The testimony of McWilliams and both the Corriganes that the agreement was read over to Ralph before it was signed is disputed only by Ralph himself. The agreement was executed in duplicate, and the next morning after it was executed Ralph called at the bank for a copy of it, which was delivered to him by McWilliams. This he admitted, and also admitted he took it to John W. Grady, telegraph operator for a railroad in Dwight, who read it over to him. Grady testified he read it over slowly to enable Ralph to understand it. His recollection was Ralph said it was all right. He said nothing about his wife not wanting to sign the deed. Ralph testified he met Corrigan (meaning, as we understand it, Thomas J. Corrigan,) about four days after Grady read the contract to him and told him his wife would not sign a deed and that he did not want Corrigan's money. Corrigan testified that this conversation was at a much later date, but however that may be, the only excuse Ralph gave for refusing to perform the agreement was that his wife would not sign the deed. He did not claim that he did not make the agreement or that his condition was such when it was made that he did not understand it. The weight of the proof is decidedly to the effect that he did understand it, and his own conduct with reference to having the abstract extended, his interviews with McWilliams and Simmons about correcting the defects in it, and his conversation with Grady, tend strongly to show that he understood the contract. In his letter of November 15 he did not claim that he did not understand the contract or that it was not in accordance with the agreement between the parties. He admitted having the \$1600 cash payment

in the bank, but refused to carry out the agreement because he said his wife would not sign the deed. The contract did not obligate the wife to join in the conveyance, but this would not defeat the enforcement of the contract made by Ralph to convey the land. *Litsey v. Whittemore*, 111 Ill. 267; *Hall v. Hall*, 125 id. 95; *Watson v. Doyle*, 130 id. 415.

While in some measure the enforcement of a contract to convey land rests in the sound discretion of the court, such discretion is not arbitrary, and where a valid contract is entered into between the parties which appears to be fair and contains no objectionable or inequitable features, its performance will be enforced. (*Cumberledge v. Brooks*, 235 Ill. 249; *Zempel v. Hughes*, id. 424; *Anderson v. Anderson*, 251 id. 415; *Heller v. McGuin*, 261 id. 588.) There is no proof that the consideration agreed to be paid for the land was not a fair and adequate price, and we find nothing in the testimony to indicate that the performance of the contract would be inequitable or unjust.

It is insisted by appellees that the contract was uncertain and did not express the intention of the parties. The claim that Ralph understood he was selling the land to Thomas J. Corrigan and that the note for the deferred payment was to bear six per cent interest from date is not supported by the evidence. Appellant admits it was intended by the contract that he should pay all taxes levied subsequent to the year 1909, whereas the agreement states he is to pay the taxes levied subsequent to the year 1910. It is evident, as the master reported, that this was a mistake, and no doubt resulted from the mention of the year in which the taxes were payable instead of the year in which they were levied. Taxes levied in 1909 were payable in 1910, and it was the evident intention of the parties that Ralph should pay the taxes levied in 1909, payable in 1910, and that appellant should pay all subsequent taxes.

The evidence in this record satisfies us that there is no escape from liability to perform this contract, and that the decree is clearly contrary to the weight of the testimony.

The decree is reversed and the cause remanded.

*Reversed and remanded.*

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WILLIAM A. GEITHMAN *et al.* Appellees, *vs.* ALFRED EICHLER *et al.* Appellants.

*Opinion filed December 16, 1914.*

1. SPECIFIC PERFORMANCE—*what is meant by a "merchantable abstract of title."* A contract for the sale of land which requires the owner to convey the land "in fee simple, clear of all encumbrances whatever, by good and sufficient warranty deed," the title to be shown by a certain date and at a later date the owner to deliver to the purchaser "a warranty deed and good merchantable abstract of title," calls for an abstract of title showing a good merchantable title and not merely a merchantable abstract.

2. SAME—*when refusal to accept a deed and abstract is not a ground for forfeiture.* Where the owner of land has agreed to convey the same in fee simple, free from all encumbrances, and to furnish an abstract showing a good merchantable title, he is not required to furnish an abstract showing a perfect title of record, but if the abstract furnished by him does not show a connected title of record and is not supplemented by affidavits or proof supplying the facts necessary to show a good merchantable title, a refusal to accept the abstract, and the deed tendered therewith, does not justify the owner in declaring the contract forfeited.

3. SAME—*what constitutes a valid objection to abstract of title.* Where the abstract of title shows a certificate of the purchase of the lands from the State by Noah C. Anderson but no patent of record, and the next conveyance of record is from Noah C. Amsden as grantor, the fact that there is no conveyance shown from Anderson to Amsden is a valid objection to the abstract of title, in the absence of anything showing identity of parties or possession of the land, who had been in possession or how long they had been in possession.

APPEAL from the Circuit Court of DeKalb county; the Hon. CLINTON F. IRWIN, Judge, presiding.



R. K. WELSH, for appellants.

GEORGE W. BROWN, and C. D. ROGERS, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court :

This is a bill filed by appellees for the specific performance of a contract to convey land. September 21, 1912, Alfred Eichler and May Eichler, appellants, entered into a contract with William A. Geithman and James J. Hammond, appellees, whereby appellants, as parties of the first part, agreed to sell, and appellees, as parties of the second part, agreed to buy, a certain 120 acres of land situate in DeKalb county. The contract provided the grantors were to convey the land "in fee simple, clear of all encumbrances whatever, by good and sufficient warranty deed," the "title to be shown by October 15, 1912, showing title in Alfred Eichler," and that on March 1, 1913, the appellants agreed "to deliver to party of second part [appellees] a warranty deed and good merchantable abstract of title" to the land described in the contract, at which time the negotiations were to be completed. Five hundred dollars was paid on the date of the execution of the contract, to be applied on the purchase price, \$4640 was to be paid March 1, 1913, and a note given for the balance, \$12,500, secured by mortgage on the land. The contract provided that upon failure of appellees to make subsequent payments therein provided or otherwise perform their covenants, appellants might forfeit and determine the contract and retain any payments made, as liquidated damages. Time was made the essence of the contract. It appears, however, that the time or dates mentioned in the agreement were waived by mutual consent and negotiations were had toward the completion of this agreement much later than March 1, 1913, the time fixed by the contract for the completion of the sale. It appears that appellants showed appellees the abstract to the land in question January 31, 1913, and on February 14,

1913, the abstract, brought down to date, was delivered to appellees and by them submitted to their attorney for examination. On February 22, 1913, he delivered his written opinion of the abstract to both appellants and appellees, pointing out certain defects, none of which are necessary to be considered except one, which will be later referred to. February 28, 1913, appellees deposited, at the place and with the parties designated in the contract, the balance of the consideration for the land to be paid in cash and a note secured by mortgage, in accordance with the terms of the contract. Several conferences were subsequently had between the parties with a view to concluding the transaction, and appellants on March 17, 1913, met appellees by appointment, to complete the transaction. Appellants had executed a deed and assigned a lease on the premises, which, together with the abstract and tax receipt, they had with them. Appellees objected and refused to carry out the contract, claiming the title was not in compliance with the agreement. March 27, 1913, appellants left at the place designated for the performance of the contract, the deed, assigned lease, abstract and tax receipt, and on the following day served written notice upon appellees that unless the contract was completed and full payment made on or before April 8, 1913, the contract would be forfeited and determined. Some further negotiations were had between the parties, but the contract not being completed on April 8, 1913, appellants on April 19, 1913, served a notice of forfeiture on appellees. Subsequent to the latter date the original contract for the sale of the land was recorded by appellees, and on May 6, 1913, they filed their bill in chancery praying for the specific performance of the contract in question and for an injunction restraining appellants from receiving the rents of the land involved, and for general relief. Appellants filed an answer denying appellees were entitled to the relief prayed and insisting the forfeiture was valid, and filed a cross-bill alleging the title ten-

dered to appellees complied with the terms of the contract and praying that the contract now of record be canceled as a cloud upon appellants' title. Upon answer to the cross-bill and replications being filed, a hearing was had and a decree entered dismissing the cross-bill and granting the relief prayed in the original bill.

Few, if any, important facts are in dispute. The questions presented for decision are mainly questions of law arising out of the construction of the contract sought to be enforced.

Appellants contend that the contract bound them to convey to appellees, by warranty deed free from encumbrances, a fee simple title to the land but not to furnish an abstract showing such title in them of record; that the appellants owned the title they agreed to convey, and when they executed the deed and delivered it to the parties and at the place agreed upon, for appellees, together with the abstract, they had done all that was required of them by the contract, without regard to whether the abstract showed good merchantable title in appellants. In other words, the contention of appellants as to the abstract they were required to furnish is, that it was to be a merchantable abstract but not that it was to show a merchantable title in appellants. Appellants further contend that even if the contract is construed as requiring them to furnish an abstract showing a merchantable title, the abstract furnished does show in appellants a merchantable title. While other defects in the abstract were claimed to have existed, the only one relied upon by appellees for their refusal to accept the deed and abstract tendered them is as follows: The records show, as abstracted, that eighty acres of the land were purchased by Noah C. Anderson from the State and a certificate issued to him therefor, but no patent was of record. The certificate of purchase by Anderson is dated March 9, 1846, and on June 24, 1846, Noah C. Amsden conveyed the land to Caleb Olmstead. No conveyance is shown from Noah

C. Anderson to Noah C. Amsden. As a matter of fact, the land was purchased from the State by Noah C. Amsden and the name "Anderson" was written in the certificate by mistake, which was shown by appellants on the trial of the case by a certified copy by the Auditor of Public Accounts of the report of the sale of school lands in DeKalb county and also a certified copy of the patent issued, but this was not known to appellees until the documents were offered in evidence at the trial.

As we construe the agreement, appellants were bound not only to convey to appellees, by warranty deed, a good title free from encumbrances, but they were required to show by October 15, 1912, that they owned such title, and by March 1, 1913, at which time the sale was to be completed, they were to furnish appellees an abstract showing merchantable title in them. It is true the contract is not in those precise words. It obligated appellants to convey a fee simple title free from encumbrances, by warranty deed. This did not necessarily mean a perfect title of record but meant a good merchantable title. A party may have such title to land notwithstanding apparent defects in the chain are shown by the records. For instance, the Statute of Limitations may make a title good which is apparently defective as shown by the chain abstracted from the records. There is no dispute upon these propositions and the citation of authorities we deem unnecessary. The contract further bound appellants to show appellees by October 15, 1912, that they had the title which they agreed to convey, but how this is to be shown is not expressly stated in the contract. The transaction was to be completed March 1, 1913, by the payment by appellees of the balance of the cash payment and by securing the remainder of the purchase money by a mortgage on the land, at which time appellants agreed to deliver to appellees "a warranty deed and good merchantable abstract of title of the above described land." Appellants' agreement required them to convey to appellees

a good and merchantable title, and it seems clear to us the intention of the parties was, from the language used, that the abstract should show they owned and were able to convey the kind of a title they had agreed to convey to appellees. It does not appear to us a reasonable construction of the contract to say it was intended by the parties that the abstract should be a merchantable one, simply,—that is, an abstract showing matters of record affecting the title, made by a person, firm or corporation engaged in the business of making abstracts, in such form as is customary in making abstracts, as to pass current among persons buying and selling real estate and examining titles. (*Harper v. Tidholm*, 155 Ill. 370; *Heinsen v. Lamb*, 117 id. 549.) It was not a merchantable abstract appellees were buying but a merchantable title to the land, and the requirement that appellants were to furnish a “good merchantable abstract of title” to the land was intended to, and does, mean that they were to furnish an abstract showing they had the kind of title they agreed to convey. There is some testimony in the record which in our opinion tends to show that this was the construction placed upon the contract by the parties themselves. After the report made by the attorney for appellees upon the abstract of title the parties met at the Exchange Bank of Brown & Brown, at Genoa, March 17, 1913, and talked about a modification of the contract by dividing the deferred payment on the land into three installments,—one for \$5500, one for \$4000 and one for \$3000,—for which notes were to be given, the deal completed and appellants allowed until March 1, 1914, to furnish the abstract agreed to in the contract, the \$3000 note to be left with Brown & Brown as security for the performance of the agreement, and if appellants failed to procure the abstract within that time, then appellees might procure it before March 1, 1915, and deduct the cost of doing so from the note. Appellant Alfred Eichler reduced this proposition to writing, and it was introduced in evi-

dence upon the trial but was never fully agreed to and signed by the parties. In the written memorandum prepared by appellant Alfred Eichler the abstract to be furnished by March 1, 1914, is spoken of as "a merchantable abstract of title," but he claimed then, and now insists, that the abstract furnished by him before that time was a merchantable abstract and was a compliance with the agreement. As we understand it, no changes, alterations or additions have been made since that time in the abstract. If he understood the contract to mean simply that he was to furnish a merchantable abstract, it is difficult to understand why he would talk about taking a year's further time in which to procure it, and, if he failed to do so within that time, giving appellees a further year to procure it, with the right to deduct from the \$3000 note put up with the bank as security for furnishing the abstract, the costs appellees might incur in procuring it themselves. The intention of the parties is the important question, and this is to be determined from a consideration of the whole instrument. "The intention is to be determined from the language employed, when read in the light of the context of the instrument and such surrounding circumstances as will aid the court in arriving at the true intent and meaning of the parties." (*Druecker v. McLaughlin*, 235 Ill. 367; *Goodwillie Co. v. Commonwealth Electric Co.* 241 id. 42.) It is also allowable to look to the interpretation the parties themselves have placed upon the agreement, for assistance in determining its true meaning. *Storey v. Storey*, 125 Ill. 608; *Vermont Street M. E. Church v. Brose*, 104 id. 206.

Our conclusion is appellants were required by their agreement to furnish appellees an abstract showing a good merchantable title to the land in appellants. It remains to be determined whether they did so.

The land was granted to the State of Illinois by the United States, and we have above pointed out that the abstract showed the sale of the land by the State to Noah C.

Anderson but showed no conveyance from him to anyone. The next conveyance from that of the State to Noah C. Anderson in March, 1846, was by Noah C. Amsden in June of the same year. Conceding the correctness of appellants' position that the title may be good without appearing to be so from the record and that the contract to convey a good merchantable title does not mean a perfect title of record, we are still of the opinion it was the duty of appellants to furnish an abstract showing in them a good merchantable title and that they failed so to do.

There is abundant authority that a title may be deemed good although there may be a possibility of a defect; that a defect in title which will excuse the performance of a contract for the purchase of land must be sufficient to cast a cloud on the title and render it suspicious in the minds of reasonable men; that a defect which is a mere possibility but a very remote or improbable contingency, which, according to ordinary experience, has no probable basis, does not show a bad or unmarketable title, but the doubt must be considerable and rational,—such as ought to induce a prudent man to pause and hesitate. (*Attebery v. Blair*, 244 Ill. 363; *Gibson v. Brown*, 214 id. 330; *Kimball v. Tooke*, 70 id. 553; *First African M. E. Church v. Brown*, 147 Mass. 296; 17 N. E. Rep. 549; *Cambelling v. Purton*, 125 N. Y. 610; *Gill v. Wells*, 59 Md. 492.) Was the defect objected to sufficient to cast a cloud on the title?

It does not appear from the abstract that Noah C. Amsden ever acquired title by a conveyance of any character. So far as shown, the State conveyed the title to Noah C. Anderson and no conveyance from him to anyone was shown, nor was it shown that Amsden, as heir or in any other capacity, acquired title from Anderson. One of the things not shown by the records which may make an otherwise apparently defective title good is adverse possession, and it is insisted that Amsden, and those claiming title

through him, had been in the exclusive possession of the land, claiming to own it, much more than twenty years. In *Attebery v. Blair*, *supra*, the land owners contracted to convey the coal under certain lands in fee simple, by good and sufficient warranty deeds, and to furnish the purchaser abstracts showing in them such title. The abstracts did not show a perfect record title but they were supplemented with proofs in the form of affidavits, and the abstracts, in connection with the proofs, showed good title, and this was held to be a compliance with the agreement of the land owners. The court said: "In this case Blair was not bound to accept a title resting merely upon adverse possession under the Statute of Limitations, but the essence of the contract was that he should have conveyances giving him a good title free and clear from encumbrances and that such a title should be shown by the abstracts. It was not implied that the abstracts should show matters not of record or all the facts and circumstances connected with the conveyances which might affect the title, such as possession, who were the legal heirs of a deceased owner where administration was not had within the jurisdiction, and matters of that kind. An abstract of title is, in a legal sense, a summary or epitome of the facts relied on as evidence of title, and it must contain a note of all conveyances, transfers or other facts relied on as evidences of the claimant's title, together with all such facts appearing of record as may impair the title. (*Heinsen v. Lamb*, 117 Ill. 549.) It should contain a full summary of all grants, conveyances, wills, and all records and judicial proceedings whereby the title is in any way affected, and all encumbrances and liens of record, and show whether they have been released or not. If complainant furnished abstracts which, in connection with the rules of law applicable to the conveyances and with evidence of facts and circumstances explanatory of the records, showed good title in themselves free of all encumbrances, they fulfilled their obligations."



In the case before us, however, the abstract was not supplemented with proof as to who had been in possession and how long they had been in such possession. Under these conditions we think the abstract did not comply with appellants' obligation to furnish an abstract showing in them a good title. Until the appellants had complied with their agreement they could not put appellees in default and declare a forfeiture.

The decree of the circuit court is affirmed.

*Decree affirmed.*

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THE PEOPLE *ex rel.* J. D. Nothorn, County Collector, Appellee, *vs.* THE WABASH RAILROAD COMPANY, Appellant.

*Opinion filed December 16, 1914.*

**TAXES**—*when error in certificate may be cured by amendment.* Where the certificate of highway commissioners for the road and bridge tax bears the date of their first meeting in August instead of their second meeting in September, it may be proved that the commissioners, at the second meeting, fixed the same amount and rate of taxation as at the first meeting, and in such case it is proper to allow the highway commissioners to file an additional certificate showing such facts.

APPEAL from the County Court of Brown county; the Hon. W. Y. BAKER, Judge, presiding.

MCANULTY, ALLEN & HUMPHREY, and R. E. VANDVENTER, (N. S. BROWN, of counsel,) for appellant.

WARREN MCNEFF, State's Attorney, and J. F. REGAN, for appellee.

Mr. JUSTICE DUNN delivered the opinion of the court:

This appeal is from a judgment of the county court of Brown county for taxes, overruling an objection by the Wabash Railroad Company to the road and bridge tax of

Mt. Sterling township. The objection was that the tax was extended by virtue of a certificate of the commissioners of highways made at a meeting held on August 30, 1913, instead of September 2, 1913. On the hearing the court permitted an amendment, over the appellant's objection, by the filing of an additional certificate, signed by two of the commissioners, showing that at a meeting held on September 2, 1913, the commissioners fixed the same amount and rate of taxation as at the meeting held on August 30. The only question is whether this amendment was properly allowed.

Section 50 of the Road and Bridge act (Laws of 1913, p. 542,) requires the commissioners of highways in every township in counties under township organization to hold a regular semi-annual meeting between the first Tuesday in August and the first Tuesday in September of each year for the purpose of determining the tax rate to be certified by them to their respective county boards. Section 56 requires that at a regular meeting to be held on the first Tuesday in September the highway commissioners shall determine and certify to the board of supervisors the amount necessary to be raised by taxation for the proper construction, maintenance and repair of roads and bridges of the town or road district. The commissioners of highways of Mt. Sterling township met in regular semi-annual meeting on Saturday, August 30, 1913, and determined the tax rate to be certified by them to the board of supervisors to be sixty-one cents on each \$100 and that the amount to be raised by taxation for the proper construction, maintenance and repair of roads and bridges in the township was \$4500, and they made and signed a certificate to that effect, which was left with the town clerk. They adjourned until the first Tuesday in September, when they again met in regular meeting, as required by section 56, and again determined the amount necessary to be raised by taxation for the proper construction, maintenance and repair of roads

and bridges and the rate of taxation for raising that amount and directed that the same be certified as required by law, the amount and rate being the same as determined on August 30, 1913. At the time of the second meeting they directed the town clerk to deliver the certificate which they had previously made on August 30, which bore that date, to the supervisor. He did so, the supervisor filed the certificate with the county clerk, and the levy was ordered by the county board in accordance with the certificate.

The action of the commissioners was shown by the record which the town clerk kept of the two meetings, and the facts in regard to the making of the certificate, the directions to the town clerk and the delivery to the supervisor were shown by the testimony of the commissioners, the town clerk and the supervisor. The amendment was properly allowed. Everything was actually done which the law required and at the required time. All three of the commissioners were present at the first meeting and only two at the second, but the action at the latter meeting was the action of the highway commissioners as much as if all had been present. The error in the date was an informality not affecting in any manner the substantial justice of the tax. Section 191 of the Revenue law authorizes the correction of such an irregularity, and the oral testimony was admissible to show the facts which justified the amendment. *Cincinnati, Indianapolis and Western Railway Co. v. People*, 206 Ill. 565; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 207 id. 566; *Cincinnati, Indianapolis and Western Railway Co. v. People*, 212 id. 518.

The judgment of the county court is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* W. J. Holaday, County Collector, Appellee, *vs.* THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—*district road tax does not become a tax against land until levied by board of supervisors.* Where the commissioners of highways, under the laws that existed before July 1, 1913, have determined how much money shall be raised by a district road tax and have made out and delivered the list the tax may be paid in labor, but it does not become a tax against land until the list has been delivered by the overseer to the supervisor and the board of supervisors has levied the tax.

2. SAME—*tax not in accordance with law at time of levy is invalid.* A district road tax attempted to be levied by the board of supervisors on the overseers' delinquent lists after the repeal by the Roads and Bridges act of 1913 of the law authorizing such levy is invalid.

3. The other question here involved is controlled by the decision in *People v. Illinois Central Railroad Co.* (*ante*, p. 429.)

APPEAL from the County Court of Clay county; the Hon. A. N. TOLLIVER, Judge, presiding.

H. D. McCOLLUM, and KRAMER, KRAMER & CAMPBELL, (EDWARD BARTON, of counsel,) for appellant.

THOMAS S. WILLIAMS, State's Attorney, and JOHN L. BOYLES, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

Upon the application of the county collector of Clay county for judgment and order of sale against the property of appellant for delinquent district road taxes for the year 1913, the objections of appellant to the various taxes for which judgment was asked were overruled and a judgment and order of sale entered accordingly by the county court.

Seven of the towns of Clay county through which the railroad of appellant runs were prior to July 1, 1913, oper-

ating under what is known as the labor system. In each of these towns district road taxes were assessed in the spring of 1913 against the property of appellant at the rate of twenty-five cents on each \$100 valuation. These various amounts were all paid by appellant in labor except the sum of \$29.04 in the town of Clay City and the sum of \$320.53 in the town of Harter. The overseers of these two towns, respectively, delivered to the supervisors of those towns the district road tax list showing that appellant was delinquent in the payment of its district road tax in the amounts set forth, respectively. The board of supervisors caused these delinquent road taxes to be levied on the property of appellant and the same were extended against its property. The boards of highway commissioners of each of the seven towns referred to, at their regular September meeting, certified to the board of supervisors the amounts necessary to be raised by taxation for road and bridge purposes in their respective towns. At the September meeting of the board of supervisors the amounts so certified were approved and road and bridge taxes were levied and extended against appellant's property under the Road and Bridge law which became effective July 1, 1913. In one of these towns the levy was at the rate of fifty-six cents on each \$100 valuation and in each of the other towns at the rate of sixty-one cents on each \$100 valuation.

Under the objections of the appellant two questions are raised: (1) Was the county collector entitled to judgment for the delinquent district road taxes of the towns of Clay City and Harter? and (2) was the county collector entitled to judgment for the full amount of the road and bridge taxes levied under the act which became effective July 1, 1913, or was appellant entitled to deduct the district road tax it had already paid for that year? Each of these questions has arisen and has been determined in other cases at the present term. In *People v. Chicago, Indiana and Southern Railroad Co.* (ante, p. 528,) district road taxes for the

town of Norton had been returned delinquent against the railroad company under the same conditions as the district road taxes for the towns of Clay City and Harter were returned delinquent against appellant. For the reasons given in that case the objections to the taxes levied as delinquent upon the report of the overseers of those towns should have been sustained. While the commissioners of highways, under the laws that existed prior to July 1, 1913, determined how much money should be raised, and made out the list, and the contemplated taxes could be paid in labor under the direction of the overseer, it did not become a tax against the property until the list was delivered by the overseer to the supervisor and the board of supervisors caused the tax to be levied on the lands returned. (*People v. Chicago and Illinois Midland Railway Co.* 260 Ill. 624.) A tax levied upon an assessment made under a law after its repeal, and which is not in accordance with the law in force at the time the levy is made, is invalid. *People v. Toledo, St. Louis and Western Railroad Co.* 249 Ill. 175.

The second question involved was raised and determined in *People v. Illinois Central Railroad Co.* (*ante*, p. 429.) The same argument was made there in support of the validity of the tax levied and against the right of appellant to receive credit for the amount of tax it had paid in labor, and for the reason there given the court properly overruled the objections made to the several district road taxes.

The judgment of the county court overruling the objections that appellant was entitled to credit for taxes paid in labor is affirmed. In all other respects the judgment is reversed and the cause is remanded, with directions to sustain the objections to taxes levied on the overseers' delinquent lists.

*Reversed in part and remanded, with directions.*

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,  
vs. IRVIN H. TURNER, Plaintiff in Error.

*Opinion filed December 16, 1914.*

1. CRIMINAL LAW—*what statement is essential to affidavit for a continuance.* A motion for a continuance upon the ground of an absent witness is properly denied, where the affidavit in support of the motion contains no statement that there was any expectation or reasonable prospect of obtaining the presence of the witness at the next term of court or at any future time.

2. SAME—*the statute has made no provision for depositions in criminal cases.* There is no statutory provision in Illinois for the admission of depositions in evidence in criminal cases, and the court may properly refuse to require the People to consent to the admission of a deposition in evidence or have the cause continued.

3. SAME—*when an instruction characterizing offense of incest is not misleading.* An instruction stating, in the language of the statute, that if a father shall rudely and licentiously cohabit with his own daughter the father shall be imprisoned in the penitentiary for a period not exceeding twenty years is not misleading, even though many acts of intercourse other than the one the People have elected to prosecute have been proven, where another instruction expressly requires an acquittal unless the acts which the People have elected to prove are established.

4. SAME—*use of the word "credible" for "creditable" does not render instruction misleading.* The use of the word "credible" for "creditable," in an instruction stating the rule in regard to the right of the jury to reject the testimony if they believe the witness has willfully testified falsely to a material fact, except so far as it may be corroborated by other "credible" facts or circumstances, does not render the instruction misleading.

5. SAME—*when instructions as to weighing evidence and not following sympathy should be given.* In a prosecution for incest, where the evidence is close and highly contradictory and the circumstances detailed are unusually repulsive and unnatural, it is reversible error to refuse to instruct the jury that in weighing the evidence they have a right to take into consideration the common knowledge and experience of mankind and the course of the laws of nature, and that they should not allow their verdict to be influenced by prejudice against the defendant or sympathy for the daughters who testified against him.

6. SAME—*statement on former trial, though stricken out in that case as incompetent, may be shown as a contradictory statement.*

A statement made in a former trial, though stricken out in that case as incompetent, is not incompetent as a contradictory statement in another trial and may be received in evidence for that purpose if the witness testifies differently.

WRIT OF ERROR to the Circuit Court of Logan county; the Hon. T. M. HARRIS, Judge, presiding.

BEACH & TRAPP, and HUMPHREY & ANDERSON, for plaintiff in error.

P. J. LUCEY, Attorney General, E. EVERETT SMITH, State's Attorney, and D. E. DETRICH, (PETER MURPHY, and GEORGE P. RAMSEY, of counsel,) for the People.

Mr. JUSTICE DUNN delivered the opinion of the court:

The plaintiff in error was convicted of incest, and has sued out a writ of error to reverse the judgment.

Error is assigned by plaintiff in error on the denial of his application for a change of venue. Two indictments for incest were returned against the defendant at the same term and applications for a change of venue were made in each case and denied. The plaintiff in error was convicted on one indictment and the judgment was reversed by this court at the October term, 1913. (*People v. Turner*, 260 Ill. 84.) It was held that there was no error in denying the application for a change of venue. The present record is identical with the record in that case so far as the application for a change of venue is concerned, and there was therefore no error in denying the application.

Before the trial the plaintiff in error made a motion for a continuance on account of the absence of Clara H. Campbell, a material witness in his behalf, and filed an affidavit setting forth that she was now a resident of Seattle, in the State of Washington, and was too sick to come to Illinois to attend the trial; that she had been a resident of Decatur, Illinois, for many years before August, 1912, and would



testify to facts material to the defense which could not be proved by any other witness, such facts being stated in the affidavit in detail. The affidavit further stated that the plaintiff in error had caused the deposition of this witness to be taken upon oral interrogatories upon due notice to the State's attorney, with full opportunity to be present and cross-examine, and that such deposition had been returned to the clerk of the court and was on file in the cause. The motion asked that the cause be continued or the deposition be admitted in evidence on the trial. The court overruled the motion, and it is insisted that a continuance should have been allowed or the deposition should have been admitted in evidence. The affidavit was not sufficient to require the granting of a continuance, because it contained no statement that there was any expectation or reasonable prospect of obtaining the presence of the witness at the next term of court or at any future time. Our statutes make no provision for the taking of depositions in criminal cases, but it is contended that the court had the discretionary power, which it should have exercised, to postpone the trial unless the prosecution would consent to the admission of the deposition. Originally the common law courts had no power to procure the testimony of witnesses by deposition and it was not their practice to receive depositions in evidence. Depositions are not the best evidence the nature of the case admits of, and the presence of the witnesses in open court and their examination in the presence of the judge and jury were regarded as of such importance that an order for the examination of a witness on interrogatories could only be obtained by consent. (2 Tidd's Pr. 810.) The courts of common law sometimes used indirect means to coerce the adverse party into a consent to the examination of witnesses who were absent in foreign countries, under a commission for that purpose. "These means of coercion were various, such as putting off the trial or refusing to enter judgment, as in case of non-suit if the defendant was

the recusant party; or by a stay of proceedings till the party applying for the commission could have recourse to a court of equity by instituting a new suit there auxiliary to the suit at law. But subsequently the learned judges appear not to have been satisfied that it was proper for them to compel a party by indirect means to do that which they had no authority to compel him to do directly, and they accordingly refused to put off a trial for that purpose." (1 Greenleaf on Evidence, sec. 320.) This inconvenience has been remedied by statutes which provide in civil cases for taking the depositions of witnesses whose attendance at the trial cannot be procured, and in some of the States, as in Kentucky, Indiana and Massachusetts, statutes have been enacted allowing the defendant in a criminal case to take the depositions of material witnesses in his own behalf. The legislature of this State has not seen fit to provide for such a method of obtaining testimony in criminal cases, and the courts ought not indirectly to change the law by compelling prosecutors to consent to the introduction of evidence for the defendant not legally admissible. We do not recognize the existence of such power in the courts of this State.

It is insisted that after a consideration of all the evidence there remains so serious a doubt of the guilt of the plaintiff in error that the judgment should be reversed for that reason. The evidence was conflicting to the last degree. The alleged victim of the crime was the plaintiff in error's daughter Tona, who was seventeen years old at the time of the trial,—three years after she testified that the relations with her father which formed the basis of the indictment began. She, her sister Grace, three years older, and the plaintiff in error, were the only witnesses who testified directly in regard to the alleged criminal acts, all of which the plaintiff in error denied. The sisters testified to many acts of sexual intercourse between the plaintiff in error and Tona, and narrated in detail his treatment of

her in the course of the maintenance of their sexual relations for a period of about ten months prior to his arrest. These details need not be stated or discussed in this opinion. Some of them are claimed by the counsel for the plaintiff in error to be unreasonable, incredible and impossible. The testimony of physicians was introduced on either side to show the possibility or impossibility of some of the things testified to. It was shown that after his arrest and indictment the plaintiff in error had a contracted liver, a chronic inflammation of the gall bladder, a chronic inflammation of the appendix and an enlarged heart, and that he had suffered from these conditions for several years. He was operated upon for appendicitis and his appendix was removed. One of his kidneys was also found congested and enlarged. In September, 1912, between nine and ten months after the finding of the indictment, Tona was taken by her aunt for examination to a physician, who made an examination of her sexual organs and testified that he found the vaginal orifice and hymen normal, the hymen unbroken and no physical indication that she had ever had sexual intercourse. Testimony of physicians was also introduced that sexual intercourse might occur without rupturing the hymen. The two girls and their aunt were the only witnesses introduced by the People in chief, and witnesses called to impeach them testified to statements of each of them more or less inconsistent with their testimony or showing animosity against the plaintiff in error. In the end the question of the credibility of the testimony of the two daughters of the plaintiff in error is the determining factor in the case. The case is one peculiarly calculated to excite passion or prejudice, and it was the right of the plaintiff in error to have the jury accurately instructed in all matters which might influence them in arriving at their verdict.

Complaint is made that the court instructed the jury, in the language of section 156 of the Criminal Code, that

if a father shall rudely and licentiously cohabit with his own daughter the father shall be imprisoned in the penitentiary for a period not exceeding twenty years. Evidence of many acts of sexual intercourse between the plaintiff in error and Tona Turner had been introduced, and it is argued that this instruction stated an abstract principle of law, and that from it the jury might infer that a verdict of guilty would be justified because of the continued intercourse or of any one act. The object of the instruction was only to call the jury's attention to the character of the offense charged. The prosecution, having been required to make an election, had elected to ask a conviction on the acts occurring November 26, 1911. By instruction No. 12 given for the defendant the jury were informed that the prosecution had so elected, and that unless they believed the defendant committed the crime at that time they must acquit; that they could not convict for any act or acts committed at any other time; that the evidence of other acts was admitted, not for the purpose of proving that the defendant had committed other offenses, but only as bearing on the question whether or not he committed the crime of incest on November 26, 1911. The jury could not have believed, under these two instructions, that they could find the plaintiff in error guilty of any other offense than that of November 26, 1911.

The second instruction is complained of because, in stating the effect of the defendant's willfully testifying falsely upon a material point in issue, it authorizes the rejection of the whole of such testimony except so far as it may be corroborated by other "credible" proofs or circumstances in evidence in the case. The objection is to the use of the word "credible," which, it is said, is not synonymous with "creditible" but obsolete as having that meaning. It is true that the use of the word in that sense is not now common, but in this connection it could not have been misleading.

The plaintiff in error asked several instructions which were refused which in our judgment should have been given to the jury. The third and fourth instructions so refused were as follows:

3. "The court instructs the jury, as a matter of law, that in a criminal case the jury have a right to weigh and examine the evidence closely and carefully in the light of the common knowledge and experience of mankind, and you have a right to take into consideration the common knowledge and experience of mankind and the course of the laws of nature in determining whether the evidence is reasonable or unreasonable or probable or improbable and in determining what weight it is entitled to receive.

4. "And the court instructs you further, that when the evidence is heard, jurors have the right to test its weight by their knowledge and experience and their judgment derived from experience, observation and reflection. You are not bound to regard evidence precisely as given, but may consider its truth and weight by your knowledge of men, the affairs of life and the motives which influence persons. These are all proper and legitimate means of arriving at the truth in determining the issues in this case."

These instructions were important to the plaintiff in error and none of the instructions given included the principles they announce. "Jurors, when the evidence is heard, must test its truth, its weight and what it all proves, by their knowledge and judgment, derived from experience, observation and reflection. They are not bound to regard evidence precisely as given, but must consider its truth and weight by their knowledge of men, the business affairs of life, together with the motives which influence men. These are all legitimate and necessary means of arriving at the truth." (*Ottawa Gas Light and Coke Co. v. Graham*, 28 Ill. 73; *City of Chicago v. Major*, 18 id. 349; *Kitzinger v. Sanborn*, 70 id. 146.) There was much contradiction in the testimony; the circumstances were unusual; diverse

opinions of physicians were before the jury, and the case was one to which these instructions were specially applicable.

The eleventh refused instruction was as follows:

"The court instructs the jury that in determining the guilt or innocence of the defendant of the crime charged in this cause the jury should not allow any prejudice which they feel against such crime to influence them against the defendant, nor should the jury, in deciding whether the defendant is innocent or guilty, feel a prejudice against the defendant on account of the nature of the evidence against him, nor should the jury allow themselves to entertain a prejudice or bias against the defendant by reason of the fact, alone, that the witnesses against him are females; and you are further instructed that you should not allow the fact that any witness has shed tears or manifested emotion upon the witness stand to give rise in your minds to pity and arouse in your minds prejudice against the defendant in deciding the question whether he is innocent or guilty of the crime charged against him."

This instruction should have been given. Its object was to warn the jury against allowing either sympathy or prejudice to influence their verdict. It was said in *Jones & Adams Co. v. George*, 227 Ill. 64: "Instruction No. 17, which was refused, told the jury, somewhat awkwardly, that neither sympathy for the plaintiff nor prejudice against the defendant should influence their verdict. The instruction is correct in principle and we see no justifiable reason for refusing it. There was no other instruction in the series that covered this point."

Both Grace Turner and Tona Turner in their testimony fixed the time of the first intercourse between Tona and her father a few days before Tona's fourteenth birthday, February 8, 1911. The defendant attempted to contradict them by showing that at the January term, 1913, of the Logan county circuit court, at the trial of the indictment against the defendant for incest with Grace, they fixed this

date at the corresponding time in 1908. In the former trial this testimony was stricken from the record because it referred to an act with Tona which was not competent to be shown on the trial of an indictment for incest with Grace. The court refused to permit the statement to be given in evidence. If the statement was made, the fact that it was stricken from the record as incompetent did not make it incompetent in this case as a contradictory statement of the witness, and it should have been received.

During the trial of the other indictment, and before and after, Tona Turner was living in the Millikin Home, at Decatur, and it is also urged as error that the court refused evidence offered by the plaintiff in error that Ruth Hammond, the aunt who was a witness in both trials, had sent Grace Turner to Decatur to have her near Tona for the purpose of keeping her in league with herself and urging on the prosecution. It is proper to show the actions and conduct of witnesses as bearing on their motives. The fact that Mrs. Hammond had sent Grace Turner to Decatur for the purpose, as she expressed it, of keeping a line on the other children, sufficiently appears from the evidence. The evidence offered that she did this after hearing a motion for a continuance at a prior term, in which evidence of Mrs. Campbell was set out, was not necessary, when she had expressly stated her reasons for sending Grace Turner to Decatur.

It is further urged that the defendant was unduly prejudiced by statements of Tona Turner on the trial as to the relations of the defendant with his daughter Grace which were the subject of the prosecution in the former trial. An examination of the record shows that the court, on motion, excluded all evidence and statements of the witness which in any way related to the charge of incest with Grace Turner. Owing to the character of the charges in both cases, some of them being alleged to have occurred at the same time in each case when both Grace and Tona

Turner were present, it was difficult to avoid reference to those matters, but the court by his rulings tried in every way possible to keep out any allusion or reference to the charges which were the basis of the indictment for incest with Grace Turner, and in our judgment nothing prejudicial to the defendant was received.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

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THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ROBERT WALLACE, Plaintiff in Error.

*Opinion filed December 16, 1914.*

CRIMINAL LAW—*act relating to contributing to delinquency of children applies only to persons in loco parentis.* The act of 1905, which provides for the punishment of persons contributing to the delinquency of children, (Hurd's Stat. 1913, p. 808,) applies only to persons standing *in loco parentis*, and an averment of such relation is essential to an information charging a violation of the act. (*People v. Melville*, ante, p. 176, followed.)

WRIT OF ERROR to the Branch "B" Appellate Court for the First District;—heard in that court on writ of error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding.

JOHN L. HOPKINS, for plaintiff in error.

P. J. LUCEY, Attorney General, MACLAY HOYNE, State's Attorney, and D. E. DETRICH, (GEORGE P. RAMSEY, of counsel,) for the People.

Per CURIAM: Plaintiff in error was charged in an information with encouraging, aiding, abetting and conniving at the delinquency of a minor female child sixteen years



of age and doing acts that directly produced and contributed to conditions which rendered said female child a delinquent. He moved to quash the information but the motion was overruled, and he thereupon pleaded not guilty, waived trial by jury in writing, and upon a trial by the court was found guilty. A motion in arrest of judgment was overruled and plaintiff in error was sentenced to imprisonment for four months in the house of correction and to pay a fine of \$100 and costs. That judgment has been affirmed by the Appellate Court, and defendant below has sued out a writ of error from this court.

The information charges that plaintiff in error "did unlawfully, willfully and knowingly encourage, aid, cause, abet and connive at the delinquency of one Dorothy Rothenbusch, a minor female child under the age of eighteen years, to-wit, sixteen years, and did then and there knowingly and willfully do acts that directly produced, promoted and contributed to conditions which rendered said Dorothy Rothenbusch a delinquent child, in that the said Robert Wallace did then and there take the said Dorothy Rothenbusch to a room in the Ontario Hotel, at 616 North Clark street, in the city of Chicago, contrary to the form of the statute," etc. The evidence is not preserved by a bill of exceptions.

One of the grounds relied upon for a reversal of the judgment is, that the information does not allege plaintiff in error is the parent, legal guardian or custodian of the alleged delinquent child, the contention being that the statute is applicable only to persons standing *in loco parentis*. The precise question, under the same statute, was before us in *People v. Melville*, (*ante*, p. 176,) where the same contention was made by the plaintiff in error in that case and was sustained. It was there held that an information under paragraph 42**hb** of chapter 38 (Hurd's Stat. 1913, p. 808,) which failed to allege that the defendant stood in

*loco parentis* to the child named in the information failed to charge a crime. That case is conclusive of this one.

The judgments of the Appellate and municipal courts are reversed.

*Judgment reversed.*

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THE VILLAGE OF OAK PARK, Appellant, vs. S. F. ELDRED  
*et al.* Appellees.

*Opinion filed December 16, 1914.*

1. SPECIAL ASSESSMENTS—*effect of a special finding that property is benefited no more than amount assessed.* If a judgment confirming a special assessment contains a special finding that the property is benefited no more than it is assessed, such finding is a bar to any supplemental assessment to pay a deficiency in the cost of the improvement.

2. SAME—*when it is error to find specially that the property is benefited no more than assessed.* Before the court is authorized to incorporate in a judgment of confirmation a special finding that the property is benefited no more than it is assessed there must be an issue made and a hearing had on evidence presented under such issue, and it is error to make such finding upon the mere statement of counsel for the property owner that he tenders such issue and desires the court to make a finding thereon.

APPEAL from the County Court of Cook county; the  
Hon. J. E. HILLSKOTTER, Judge, presiding.

FREDERICK W. PRINGLE, for appellant.

WILLIAM T. HAPEMAN, for appellees.

Mr. JUSTICE VICKERS delivered the opinion of the court:

This was a proceeding for a special assessment to pay for the paving of Home avenue, in the village of Oak Park. This appeal is by the village, and presents the question whether the court erred in specially finding in the judgment of confirmation that appellees' property was benefited no more than the amount assessed against it. The entire as-

assessment proceeding is regular and neither party is complaining of any error that affects the validity of the present assessment.

Appellant contends that the effect of the finding that appellees' property is benefited *no more* than the amount assessed against it will relieve the property from any supplemental assessments that may hereafter become necessary. Appellant does not question the power of the court, in a proper case, to make a special finding in its judgment confirming an original assessment to the effect that any property will not be benefited more than is assessed against it in such original assessment, but the complaint here is that the court made such a special finding in respect to appellees' property in an irregular and erroneous manner. On the hearing appellant offered its formal proof and rested its case, and thereupon appellees introduced testimony on certain of their legal objections, all of which were overruled, and the case was then called upon the question of benefits. Thereupon the appellees orally stated to the court that they tendered the issue that their property was benefited no more than the benefits which were assessed against it but offered no proof to support such issue. Appellant objected to any finding being made upon the question whether the benefits to appellees' property were equal to the assessment made against it, and after the court had indicated that a finding of that character would be made, appellant then asked leave to introduce evidence showing that the benefits to appellees' property were greater than the amount of the original assessment. The court refused to hear such evidence and over the objections of appellant entered the judgment of confirmation, including therein a special finding that appellees' property was benefited no more than the amount assessed against it.

Section 59 of the Local Improvement act of 1897 provides, *inter alia*, that "it shall be no objection to such assessment [supplemental assessment] that the prior assessment

has been levied, adjudicated and collected unless it shall appear that in such prior cause upon proper issue made, it was specially found in terms, that the property objected for would be benefited by said improvement no more than the amount assessed against it in such prior proceedings." The effect of a judgment of confirmation is to establish, *prima facie*, that the property assessed is benefited only to the extent of the assessment, and upon an application for the confirmation of a supplemental assessment the burden of showing that there is an excess of benefits over the original assessment rests upon the municipality, (*McChesney v. City of Chicago*, 188 Ill. 423,) and if the judgment of confirmation in the original proceeding includes a special finding that a given piece of property is benefited no more than the amount of such original assessment, the question of benefits as to such property becomes *res judicata* and such property cannot be further assessed by a supplemental proceeding instituted for the purpose of paying a deficiency in the cost of the original improvement. (*Town of Cicero v. Green*, 211 Ill. 241; *Sheriffs v. City of Chicago*, 213 id. 620.) The effect, therefore, of inserting in the judgment of confirmation a finding that property is benefited no more than the amount assessed against it is to erect a bar against any future supplemental assessments that may become necessary to complete the improvement. The statute gives no hint of the manner in which the issue shall be tendered or the proper method of procedure when such issue is made, and so far as we are advised the construction of the clause of the statute above quoted has not heretofore been determined by this court. Whatever else the statute may mean, it certainly cannot be contended that such special finding may be made in regard to any property simply upon counsel for the property owner stating in open court that he tenders such issue and requests the court to make such finding. That course was pursued in the case at bar. The making of an issue implies that there is some material matter as-

serted on one side and denied on the other, and where such issue is joined in any legal proceeding it follows that there is something to be determined. In *Town of Cicero v. Green, supra*, such issue was made and tried by a jury, and this court, without commenting on the procedure, held that a verdict of a jury upon the question of benefits that the property is not assessed more nor less than it will be benefited by the improvement nor more nor less than its proportionate share of the cost, and a judgment based thereon, were *res judicata* on the question of benefits and exempted the property from all supplemental assessments for such improvement. Logically and necessarily, when such issue is made, if the municipality desires to contest it there should be a trial of the question by a jury, or, if the parties so agree, by the court, and each party should have the privilege of introducing evidence. In regard to the manner of making up such issue the statute is entirely silent. The method pursued in the case at bar was merely an oral altercation between the attorneys, but no objection seems to have been made below as to the method of procedure in this regard, and while, in our opinion, the better practice would be to reduce the issue to writing, still, where the parties do not object to the confirmation of an oral issue, we would not be inclined to reverse a judgment for this irregularity, alone. In the case at bar, as already shown, the only proceeding upon which the special finding and the judgment rest is the oral statement of counsel for appellees to the effect that he desired to present the issue that the property was benefited no more than the assessment, and upon this request the court incorporated such special finding in its judgment. In this the court erred, for which error the judgment of the county court of Cook county must be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

*Reversed and remanded.*

THE PEOPLE *ex rel.* Frank C. Vaughan, County Collector,  
Appellee, *vs.* THOMAS SCANLAN *et al.* Appellants.

*Opinion filed December 16, 1914.*

1. DRAINAGE—*when drainage commissioners have no power to make oral contract.* Under section 35 of the Farm Drainage act drainage commissioners have no power to enter into an oral contract, on a private bid, for work in the district which is to cost more than \$500.

2. SAME—*when an additional drainage assessment is invalid.* Where a farm drainage assessment is levied to pay the cost of cleaning out and improving a certain portion of the main ditch, for which work a written contract is entered into with the lowest responsible bidder, but thereafter the commissioners make an oral contract with the same contractor to clean out and improve another portion of the ditch and pay for the work out of the assessment already levied, they have no power to make an additional assessment to replace the money so wrongfully diverted.

3. SAME—*the commissioners must proceed legally though commanded by order of the court to do the work.* The fact that drainage commissioners are commanded by an order of the circuit court in a *mandamus* suit to proceed to make necessary surveys and estimates and to levy an assessment for improvements found by the court to be necessary, does not relieve the commissioners from proceeding in accordance with the provisions of the statute in obeying such order.

4. APPEALS AND ERRORS—*bill of exceptions need not expressly state that it contains all the evidence.* The fact that the bill of exceptions contains all the evidence need not appear by an express statement to that effect in the bill itself or the certificate of the trial judge if it sufficiently appears from expressions in the bill, which, considered collectively, are equivalent to such statement.

5. SAME—*effect where last day for filing appeal bond falls on Sunday.* Where the last day of the period fixed by the court for filing an appeal bond falls on Sunday it is sufficient if the bond is filed on the succeeding day.

APPEAL from the County Court of Lee county; the  
Hon. ROBERT H. SCOTT, Judge, presiding.

BROOKS & BROOKS, for appellants.

HARRY EDWARDS, State's Attorney, CHARLES H. WOOSTER, and TRUSDELL, SMITH & LEECH, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court :

This is an appeal from a judgment of the county court of Lee county rendered against the appellants' property for alleged delinquent assessments levied by Union Drainage District No. 1 of the towns of Harmon and Marion, in Lee county.

Union Drainage District No. 1 was organized under the Farm Drainage act and certain improvements were made. Several years thereafter, and on February 9, 1912, the circuit court of Lee county issued a writ of *mandamus* on the petition of certain land owners of the district, directing the commissioners to proceed at once to cause to be made a survey and an estimate of the expense of deepening, widening, cleaning out and improving the main ditch in the said district through its entire length, from the outlet on the west line of section 27 in said town of Harmon, so as to provide sufficient drainage for the lands within the district. The commissioners thereupon employed an engineer, who on June 18, 1912, made a written report to the commissioners, which is designated as "Engineer's report No. 1," wherein he made recommendations for the improvement of the main ditch from the outlet on the west line of said section 27 in the town of Harmon to the east line of section 30 in the town of Marion. The ditch was divided into stations, the station at the outlet being No. 0 and the one at the east line of said section 30 being No. 231. The stations were one hundred feet apart. There is a bridge over the ditch at station No. 231, known as the Blackburn bridge. The engineer estimated that the amount of excavation necessary between stations 0 and 231, in order to improve the ditch to the necessary width and depth and to place it in proper condition, was 53,144 cubic yards, which he estimated would cost \$7997.10 to re-

move. Thereafter, on July 15, 1912, the commissioners of the district held a meeting, as is disclosed by their records, for the purpose of conferring on the matter of the addition of certain lands to the district and to ascertain the liabilities and outstanding indebtedness of the district and the "probable cost of the work of the proposed cleaning, repairing and otherwise bettering the condition of the main ditch of the above mentioned district, and then and there did authorize a levy of eleven thousand five hundred four and 97/100 dollars, (\$11,504.97,) and ordered the clerk of the board of commissioners to make the levy as aforesaid," according to the classification of the lands of the district. This is the only record showing the making of this levy or the purpose for which it was made. Thereafter, on July 30, the commissioners advertised for bids for the proposed improvement in the district, which was described as follows: "Cleaning out, alteration of course and improvement of banks of the present existing open ditch, known as the main ditch, in the said district, said improvement extending from the intersection of said ditch with the west line of section No. 27 in said Harmon township to the intersection of said ditch with the east line of section No. 30 of said Marion township." By the advertisement the twenty-second day of August, 1912, was fixed upon as the day the commissioners would receive bids at the Harmon Bank, in the village of Harmon, for the construction of the proposed work. On that day the commissioners met, and the bid of Henry P. Johnson "to clean out the said main ditch and remove the dirt according to said plans and specifications for the sum of fourteen cents (14c) per cubic yard," being the lowest bid, was accepted and a written contract was entered into between said Johnson and the commissioners on November 5, 1912, for the doing of the work set forth in the advertisement at the price specified in the bid. The plans and specifications referred to were not offered in evidence.



On September 6, 1912, the engineer made his report designated as "Report No. 2," in which he made recommendations for the improvement of the ditch between stations 231 and 283, lying east of the Blackburn bridge. On November 1, 1912, the engineer made his report No. 3 to the commissioners, in which he made recommendations for the improvement of the ditch up to and including station 320, which was at the limits of the district. This last report also was in reference to work to be done east of the Blackburn bridge. By reports Nos. 2 and 3 the engineer recommended considerable new work to be done by way of excavating a new ditch. His estimate for the cost of the work to be done east of the Blackburn bridge, or station 231, including both the excavation to be made in the old ditch and the excavation of new ditches, and the estimate of \$531.90 for the costs of a new right of way, was \$2876.78.

When Johnson arrived on the ground with his machinery to do the work, instead of beginning upon that portion of the ditch described in his contract he placed his dredge east of the Blackburn bridge, and under an oral contract thereupon entered into between himself and the commissioners without any advertisement or public letting, whereby it was agreed he should be paid fourteen cents per cubic yard for excavating new ditches, he proceeded to do the work contemplated and recommended by the engineer in his reports Nos. 2 and 3. As this work progressed the commissioners paid him therefor out of the assessment of \$11,504.97 made by them at their meeting on July 15, 1912.

It does not satisfactorily appear from the record just how much money was paid for that part of the improvement east of the Blackburn bridge, but there is sufficient in the record to show that it amounted to more than the estimate of the engineer. After completing the work east of the Blackburn bridge, which he performed under oral contract with the commissioners on his private bid, Johnson

then started at station 231 and proceeded westward upon the work provided for in his written contract until he arrived at station 77. At that time the funds of the district were exhausted and the work ceased. The commissioners thereupon submitted a report to the circuit court of Lee county in the *mandamus* suit, and petitioned the court to enter an order authorizing them to levy a further and additional assessment upon the lands of the district to enable them to complete the work from station 77 to the outlet of the main ditch. The court thereupon entered an order finding it necessary that a further assessment be made, approved the report of the commissioners, and ordered that the commissioners proceed, without unnecessary delay, to levy an additional assessment for the purpose of defraying the costs and expenses of completing the work from station 77 to the outlet of the ditch. Thereafter the commissioners met on June 28, 1913, and the following record was made: "Motion made and seconded, \$4020.40 be levied on lands of district according to classification on record and compliance with order of court June 27, 1913." Thereafter the assessment was spread upon the lands of the district according to the classification, and it was this assessment on the lands of objectors that was returned delinquent and concerning which this controversy arose.

Numerous objections were filed by appellants to the collection of this assessment. The objections that the assessment is based on an invalid classification, that the lands of William Morrissey were not legally included within the district and classified, that the assessment on the lands of George W. Swartz was not made upon the proper classification, and that the assessment was made, in part, to pay an indebtedness owing to the Bank of Harmon, are not supported by the record, the proof in regard to these various matters being either insufficient or consisting of incompetent evidence.

It is objected that the record of the commissioners is not a sufficient basis for the spreading of the assessment and the levy of the tax. While the record, which we have above set out, is informal and not in compliance with section 26 of the Farm Drainage act, the commissioners were powerless to make this assessment even though they had proceeded in strict conformity with the statute by passing a resolution as is therein contemplated. While it may fairly be inferred that the commissioners contemplated from the outset to make all the improvements necessary in the district, as well those needed above the Blackburn bridge as those needed below, it is apparent from the state of the commissioners' record that the first assessment was levied on the lands of the district for the purpose of cleaning and improving the main ditch from its outlet to station 231, at the Blackburn bridge. At the time this assessment was ordered to be spread the commissioners had received only one report (No. 1) from their engineer, which was in reference only to the improvement of the ditch up to station 231. The advertisement for the letting of the work and the contract with Johnson to do the work applied specifically to that portion of the ditch, only. Reports Nos. 2 and 3 of the engineer were not received until after the first assessment had been spread, advertisement for the construction of the work had been made, the bids received and the contract awarded. The commissioners acted clearly in violation of the plain provisions of the statute when they entered into an oral contract with Johnson, on a private bid, to do the work recommended by the reports of the engineer to be done east of the Blackburn bridge. The engineer estimated the total cost of the work to be \$2344.88. Section 35 of the Farm Drainage act specifies the manner of letting contracts for work where the cost of the entire work exceeds \$500. Under this section, notice must be given of the time and place of the letting, the kind and amount of work to be done and where plans of the same

may be seen, by publication for twenty days in some newspaper printed and published in the county, and the bids are required to be under seal. To enter into a contract with Johnson, on a private bid and without a public letting, to improve that part of the district east of the Blackburn bridge according to the plans and specifications of the engineer was a violation of the statute and a plain diversion of the funds of the district from the purpose for which they had been raised by special assessment. Having diverted the funds raised for the express purpose of improving that portion of the district between stations 0 and 231, the commissioners have no power to levy an additional assessment to replace the funds so wrongfully diverted. The objection of appellants that the assessment to replace funds which had been wrongfully diverted was illegal should have been sustained.

The appellee meets this objection apparently upon the theory that the whole of the proposed work in the district, both that east of the Blackburn bridge as well as that west of it, constituted a single unit and was all work which the commissioners were authorized to have done, and that the contract of Johnson was to do but a part of the whole work for which the original assessment was spread. It does not explain, however, wherein that alters the situation or authorizes the commissioners to make this additional assessment. More than enough money was realized from the first assessment to complete the only valid contract made, and it should have been used for that purpose. The land owners had the right, if all the work contemplated was to be considered as one improvement, to have the whole of it contracted for at a public letting, or at least to have it so contracted for by sections. The objections filed by appellants fully covered the situation, and the application for judgment and for order of sale should have been denied.

The fact that the commissioners were commanded to make necessary improvements in the district by the circuit

court did not relieve them of the necessity of proceeding in accordance with the provisions of the statute in complying with that order. The circuit court merely found that the improvements were necessary, and commanded the commissioners to proceed, without unreasonable delay, to cause a survey, an estimate of expenses and an assessment to be made and then to have the necessary work performed. This mandate did not relieve the commissioners from any duty imposed upon them by the statute. The further order made by the circuit court in the *mandamus* suit upon the petition of the commissioners, wherein they were ordered to proceed to make an additional levy to complete the work, did not authorize them to proceed illegally. The objectors were not parties to the *mandamus* suit, and this order was not procured by them or with their knowledge or consent.

Appellee contends that the bill of exceptions is insufficient because it is not shown, either by the certificate of the trial judge or otherwise, to contain all the evidence heard or considered by the court. We regard the bill of exceptions sufficient for the purpose of presenting the error which we have above considered, although there is no direct statement in the bill of exceptions, or in the certificate of the trial judge thereto, that it contains all the evidence. The bill of exceptions, in the beginning, recites that "the applicant, to maintain the issues on his behalf, offered and introduced in evidence the following, that is to say," after which appears the evidence offered in chief by the applicant, which made out a *prima facie* case, and at the conclusion of this evidence appears the statement, "and thereupon the applicant duly rested his case." Immediately following the language last quoted appears the following: "And thereupon the objectors, in order to maintain the issues on their part, offered and introduced in evidence the following, that is to say." The evidence offered by the objectors is then set out, followed by the statement of the attorney for the objectors, "We rest." Immediately after this state-

ment appears the following: "And thereupon the relator, in order to maintain the issues on his behalf, offered in evidence the following, that is to say," after which appears the evidence offered by the applicant in rebuttal, at the conclusion of which appears the statement made by the attorney for the applicant, "We rest," and this is followed by the judgment of the court.

In *Marine Bank of Chicago v. Rushmore*, 28 Ill. 463, objection was made to the bill of exceptions on the same ground here urged, and it was there said: "In the case of *Stickney et al. v. Cassell*, 1 Gilm. 420, and again in the case of *Harris et al. v. Miner*, at this term, this court held that it was immaterial whether the fact is expressly stated that the bill of exceptions contains all the evidence or is manifested in any other way. It is not expressly stated in this bill of exceptions that it contains all the evidence offered, but it states, after reciting the evidence, 'the testimony here closed.' This is equivalent to an express averment that it was all the evidence heard in the cause." So in the case at bar, those portions of the bill of exceptions above quoted, when considered collectively, are equivalent to an express averment that the bill of exceptions contains all the evidence heard in the cause. In *Cerny v. Glos*, 261 Ill. 331, the certificate of evidence disclosed practically the same situation as is presented by this bill of exceptions, and it was held that it showed, on its face, that it contained all the evidence.

Appellee also contends that the bond of appellants was not filed within the forty days allowed them in the appeal order in which to file their bond. Appellants filed their bond on the forty-first day after the order allowing the appeal. As the fortieth day fell upon Sunday, the bond was filed in apt time.

For the reasons indicated the judgment of the county court is reversed and the cause is remanded, with directions to sustain the objections.

*Reversed and remanded, with directions.*

THE PEOPLE *ex rel.* W. P. Dixon *et al.* Appellants, *vs.* THE BOARD OF EDUCATION OF KANKAKEE SCHOOL DISTRICT *et al.* Appellees.

*Opinion filed December 16, 1914.*

MANDAMUS—*courts do not take judicial notice of population of school district.* Where the statutory provisions sought to be enforced by a petition for *mandamus* against school officers to compel them to hold an election are applicable only to school districts of a certain population, the petition must allege the population of the school district in which the election is sought, as the courts will not take judicial notice of that matter.

APPEAL from the Circuit Court of Kankakee county; the Hon. FRANK L. HOOPER, Judge, presiding.

GOWER, HOBBIÉ & PARISH, for appellants.

W. H. DYER, State's Attorney, SMALL & MERRILL, A. E. SMITH, DYER & WHITTEMORE, SAVARY & RUEL, and J. BERT. MILLER, for appellees.

Mr. JUSTICE FARMER delivered the opinion of the court:

Appellants, as relators, filed in the circuit court of Kankakee county, against the board of education of Kankakee school district, the clerk of the board, treasurer of the school district, three township treasurers of townships overlapping in Kankakee school district, and the county superintendent of schools in Kankakee county, a petition for a writ of *mandamus* to compel the parties made defendants to the petition, or such of them as should so act, to call an election under the general School law to elect two members of the board of education of Kankakee school district. The petition alleges the Kankakee school district was incorporated by a special charter or act of the legislature in 1865 and sets out the act. The first section of the act defines the boundaries of the district. The second section vests the government of the district in a board of education composed

of six members, to hold office for three years and until their successors are elected and qualified. The third section provides for the election of six members of the board the first Monday in August, 1865. Two of them were to serve one year, two of them two years and two of them three years. At their first meeting they were to draw lots for their respective terms of office, and on the first Monday in August annually thereafter two members were to be elected. The fourth section provided that the board should meet the second Monday of August in each year and elect one of its members president and another member clerk, to hold their offices one year. The petition alleges that on the seventh and eighth days of April, 1914, petitions for the election, as required by law, of two members of the board of education, to serve for three years, were filed with the board of education, but the board failed and refused to give notice and hold an election as was its duty under the law, and that two persons, Alfred Beaumont and Lawrence Babst, are now holding over and acting as members of said board by reason of the refusal of the board to hold an election. The petition avers notice to the board of education, its officers and members, of the filing of the petition for an election and the making of a demand upon them to give notice and hold an election in accordance with the statute in force governing such elections. The petition also avers similar notices were given and demands made upon the other parties made defendants to the petition. The petition was demurred to, the demurrer was sustained and the petition dismissed. On the ground that in one phase of the case the validity of a statute is involved, an appeal was prosecuted by the relators direct to this court.

Appellants contend that the provisions of the special charter of the Kankakee school district for the election of members of the board of education in August were repealed by the act of 1909, entitled "An act to establish and maintain a system of free schools." (Laws of 1909, p. 343.)



Section 126 of that act is as follows: "The election of boards of education shall be governed by the provisions of this act relating to the election of boards of directors: *Provided, however*, that boards of education shall have power to establish a suitable number of voting precincts, and fix the boundaries thereof for the accommodation of the voters of the district in which such election is held, in each of which voting precincts there shall be one polling place designated by the board. Whenever the board of education shall establish more than one voting precinct for such election they shall appoint two judges and one clerk for each polling place, assigning so far as practicable at least one member of such board to each polling place. When the time for the election of members of boards of education or boards of inspectors is fixed by virtue of any special act, such election may be held at the time provided for the election of school directors."

It is insisted that the provision that when the time for the election of members of the board is fixed by special act the election "may" be held at the time provided for the election of school directors, which is the third Saturday in April, means the election shall be held at that time, notwithstanding section 276 of the same act provides that the act "shall not be construed so as to repeal or change, in any respect, any special act in relation to schools in cities having a population of fewer than 100,000 inhabitants, or cities, townships or districts," except in certain respects in no way involved in this case. It is further contended by appellants that if section 276 of the general act of 1909 be construed as rendering of no effect the provision of section 126 that elections for members of boards of education, when the time for such election is fixed by special act, may be held at the time provided for the election of school directors, then the election is provided for and controlled by the general act of 1907, entitled "An act to enable school districts acting under special charters to hold elections for the elec-

tion of school directors, members of boards of education, and members of boards of school inspectors, at the time provided for the election of school directors under the general School law of the State." (Laws of 1907, p. 525.)

Appellants seek to present for our decision the effect of the provisions of section 126 upon the special charter as to the time of holding elections for members of the board of education for Kankakee school district. Section 126 is one section of a subdivision of the act of 1909, entitled "An act to establish and maintain a system of free schools," and that section and the other sections of the same subdivision refer to school districts with a certain population. Other subdivisions refer to districts having a different population. The petition contains no averment as to the population of the district, and one of the objections made to it by appellees is that it is fatally defective in not stating the population of the Kankakee school district,—that is, whether it had a population not less than 1000 nor more than 100,000. Sections 123 to 127, both inclusive, of the act of 1909 relate to such school districts. Section 123 provides for the election, in such districts not governed by special acts, of a board of education, consisting of a president and six members. We have above quoted section 126 of the 1909 act in full. It is the last sentence of that section which provides that when the time for the election of members of the board is fixed by special act such election may be held at the time provided for the election of school directors. It is true, section 126 applies to boards of education in districts organized under section 123 and also to districts organized by special charter, but the districts referred to are districts having a population not less than 1000 nor more than 100,000. Sections 123 to 127, both inclusive, are embraced in the act of 1909 under the subdivision "Boards of education," and the next subdivision is, "Boards of education in cities of 100,000." We think the petition should show, by apt averment, that the Kankakee school district has not less

than 1000 nor more than 100,000 population before it can claim any benefit from or ask for the construction of those sections of the act which apply to districts of that class. Appellants say courts will take judicial notice of population, but we know of no precedent, and none is cited, that courts will take judicial notice of the population of a school district.

In our opinion the petition was insufficient, on its face, to present the question sought to be adjudicated.

The judgment is affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* Harry R. Smith, County Collector,  
Appellee, *vs.* THE CHICAGO, INDIANA AND SOUTHERN  
RAILROAD COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—*county board has power to levy a tax for State aid roads.* The legislature having made the construction or improvement of State aid roads a county purpose and provided that an acceptance by the county board of the allotment made by the State highway commission may be made by giving notice that a tax has been assessed, it follows that the county board has authority to levy such tax under its power to levy taxes for county purposes. (*People v. Kankakee and Seneca Railroad Co. ante*, p. 497, followed.)

2. SAME—*what necessary to authorize additional tax for damages for altering or ditching roads.* No tax can be levied for any of the purposes specified in section 58 of the Roads and Bridges law, which permits an additional tax levy to pay damages allowed, awarded or agreed upon for the purpose of laying out, widening, vacating or altering roads or for ditching to drain roads, unless the record of the highway commissioners shows that damages for some one of those purposes have been agreed upon, allowed or awarded to a property owner.

3. SAME—*the certificate should show the amount necessary to be raised to pay damages.* Under section 58 of the Roads and Bridges law the certificate of the highway commissioners should show, in dollars and cents, the amount necessary to be raised by taxation to pay damages allowed, awarded or agreed upon for the purposes specified, and it is not sufficient to merely state that such amount is equal to ten cents on each \$100 valuation.

4. SAME—*when a district road tax is invalid.* A district road tax attempted to be levied against land by the board of supervisors on the overseers' delinquent lists after the repeal by the Roads and Bridges act of 1913 of the law authorizing such levy is invalid. (*People v. Chicago, Indiana and Southern Railroad Co. ante*, p. 528, followed.)

APPEAL from the County Court of Bureau county; the Hon. JAMES R. PRICHARD, Judge, presiding.

WATTS A. & CAREY R. JOHNSON, for appellant.

C. N. HOLLERICH, State's Attorney, for appellee.

Per CURIAM: The county court of Bureau county overruled objections of the appellant to the application of the county collector for judgment against its property for a county tax levied for State aid roads, an additional road and bridge tax of the town of Selby and the district road tax in five road districts of the town of Hall, and entered judgment with an order of sale of the property to pay the taxes. An appeal was taken from the judgment.

The county tax, levied by virtue of a resolution of the county board, included as one of the items an amount for State aid roads. The objection of the appellant was that the only methods by which funds could be provided for State aid roads were those mentioned in section 22 of the Road and Bridge law, by an appropriation from funds in the county treasury or by submitting to a vote of the people the question of issuing bonds. We considered that question in *People v. Kankakee and Seneca Railroad Co.* (*ante*, p. 497,) and there decided that the General Assembly having made the construction or improvement of State aid roads a county purpose and provided that an acceptance by the State highway commission may be made by giving notice that a tax has been assessed, the county board has authority to levy a tax under its general power to levy taxes for county purposes. Such a tax is legal. It fol-

lows that the court did not err in overruling the objection to the tax in question.

The commissioners of highways of the town of Selby certified to the county board a tax of sixty-one cents on each \$100 valuation of the taxable property in the town for the construction, maintenance and repair of roads and bridges, under the authority of section 56 of the Road and Bridge law, and added the following certificate: "And we hereby further certify that the amount agreed upon, allowed or awarded as damages for laying out, widening, altering or vacating roads or for ditching to drain roads is an amount equal to ten (10) cents on each \$100." An additional tax was levied by the county board by virtue of this certificate and is the tax objected to. The town clerk was a witness and identified the records of the highway commissioners, and testified that the only record relating to the additional tax was the certificate. He was then asked whether any damages had been allowed, awarded or agreed upon for the purpose, or for laying out, widening, vacating or altering roads, or for ditching to drain roads, and the court sustained an objection to the question. No tax can be levied for any of the purposes specified in section 58 of the Road and Bridge law, which permits an additional levy to pay damages allowed, awarded or agreed upon for the purpose of laying out, widening, vacating or altering roads or for ditching to drain roads, unless the record of the highway commissioners shows that damages for some one of those purposes have been agreed upon, allowed or awarded to a property owner. (*People v. Cairo, Vincennes and Chicago Railway Co.* 252 Ill. 395; *People v. Chicago, Burlington and Quincy Railroad Co.* id. 482.) In both of those cases there was oral testimony that no damages had been agreed upon, allowed or awarded, but in this case that fact already appeared from the record, and it is immaterial whether oral proof was admissible. The record showed that a proper basis for the levy of the tax

did not exist, and the court erred in overruling the objection to the tax. The certificate stated that the amount required was equal to ten cents on each \$100 valuation, while section 58 requires the commissioners to specify in their certificate the amount necessary to be raised by taxation for the purpose of paying damages. A tax-payer has a right to know from the certificate the amount levied as a tax, so that he need not go to the tax records to find the total valuation of property and make computations to learn what the rate of ten cents would amount to.

Prior to the enactment of the present Road and Bridge law, which took effect July 1, 1913, the town of Hall was under the labor system. A district road tax was assessed and the list was made and subscribed by the commissioners and filed in the office of the town clerk on May 19, 1913, under the law then in force. The appellant had property in five road districts and was one of the property owners who did not pay the tax in labor. The county board levied the tax on the property of appellant, and it objected that the overseers of highways in the respective districts had no authority after July 1, 1913, to deliver to the supervisor any tax list under the repealed law and the county board had no authority to cause any amount of the unpaid tax to be levied. This question has received the consideration of the court at the present term in *People v. Chicago, Indiana and Southern Railroad Co.* (ante, p. 528,) and *People v. Baltimore and Ohio Southwestern Railroad Co.* (ante, p. 591,) and for the reasons given in those cases the objections to the taxes levied as delinquent upon the report of the overseers should have been sustained.

The judgment is affirmed as to the county tax and is reversed as to all other taxes, and the cause is remanded to the county court, with directions to sustain the objections to such other taxes.

*Reversed in part and remanded, with directions.*

BENJAMIN F. SCHLAU, Appellant, vs. ELIZABETHA  
ENZENBACHER, Appellee.

*Opinion filed December 16, 1914.*

PRINCIPAL AND AGENT—*dissolution of partnership terminates a contract appointing the partnership as agent.* A contract appointing a partnership to act as agent of the owner of land in selling the lots is immediately terminated by the dissolution of the partnership, and the fact that one partner continues in the real estate business under the firm name does not authorize him to bind the owner by executing a sale contract in his own or in the firm name.

APPEAL from the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding.

CASWELL & HEALY, for appellant.

VINCENT D. WYMAN, CHARLES E. CARPENTER, and OTTO W. JURGENS, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

This is an appeal from a decree of the superior court of Cook county dismissing for want of equity the appellant's bill for specific performance. On September 9, 1909, Elizabetha Enzenbacher, the appellee, entered into a written contract with John P. Foerster and Bernard F. Clettenberg, doing business under the firm name of John P. Foerster & Co., whereby said Foerster & Co. were given the agency, for a period of three years from that date, to sell 146 lots therein described and of which appellee was the owner, in Robert S. Disney's Irving Park subdivision in the northwest quarter of section 14, township 40, north, range 13, east of the third principal meridian, in Cook county. By this agency contract it was provided that if Foerster & Co. succeeded in disposing of 73 or more of the said lots during the term of that contract the contract should be extended for a further period of three years in which to dispose of the remaining lots upon the same terms and con-

ditions as stipulated in the contract. Under this contract Foerster & Co. were authorized to sell the lots specified, either for cash or on installments, to collect the purchase price as it became due and pay appellee her portion of the same as it was collected, and to have control, generally, of each sale until the full amount of the purchase price had been paid. Appellee agreed to execute, simultaneously with each contract of sale, a warranty deed conveying to the purchaser the lot so contracted to be sold, which deed was to be held in escrow by Foerster & Co. until the entire amount of the purchase money should be paid, whereupon Foerster & Co. were authorized to deliver the same to the purchaser. Between the date of the contract and the month of September, 1912, Foerster & Co. contracted for the sale of 21½ of said lots. On September 7, 1912, John P. Foerster, under and by the name of Foerster & Co., entered into a contract with Benjamin F. Schlau, the appellant, for the sale of 51½ lots, which would bring the total number of lots sold to 73 and would thus extend the contract of agency between appellee and Foerster & Co. for a further period of three years. When requested to make deeds of conveyance of these lots to appellant and to ratify the sale to him, appellee declined to do so and denied the authority of John P. Foerster, who was then doing business under the style of John P. Foerster & Co., to bind her by his contract with appellant.

Numerous questions are raised on this record and each of them is argued exhaustively. It will be necessary for us to consider but one of the points presented.

On April 1, 1911, the partnership theretofore existing between John P. Foerster and Bernard F. Clettenberg was dissolved and that firm and partnership thereupon ceased to exist. John P. Foerster continued in the real estate business and continued to use the old firm name of John P. Foerster & Co. Appellee was eighty-three years of age at the time of the hearing on the bill herein, and at the time



of the execution of the contract of September 9, 1909, she was in feeble health and continued in that condition thereafter until this controversy arose. She very seldom left her home and was never in the office of Foerster & Co. but once after the execution of the contract of September 9, 1909. While some contracts for the sale of lots were made by Foerster in the name of John P. Foerster & Co. after the dissolution of the partnership, it does not appear from the record that appellee was ever informed of the dissolution of the partnership, or that she knew, until the contract was entered into between John P. Foerster and appellant, that the partnership had been dissolved and that the interest of Clettenberg in the agency contract had ceased.

The dissolution of a partnership which has been authorized to act as agent is generally held to revoke the agency. In *Martine v. International Life Society of London*, 53 N. Y. 339, in dealing with a similar question, the Court of Appeals said: "The death of one member of a firm operates immediately and inevitably as a dissolution. (Story on Partnership, sec. 317; Parsons on Partnership, 438.) During the existence of a partnership each member is deemed to be authorized to transact any business for the firm, but upon dissolution this authority ceases and the only authority of the survivor is to close up the business. He has no right to create new obligations, nor, indeed, to do anything in the name of the firm except such as is necessary in adjusting and closing its concerns. (*VanKeuren v. Parmelee*, 2 N. Y. 523.) It is a general rule of the common law that an authority by a principal to two persons to do an act is joint and the act must be concurred in by both. (Dunlap's Paley on Agency, 177; *Green v. Miller*, 6 J. R. 39; 13 Jurist, 938; Story on Agency, sec. 42.) When a firm is appointed to an agency this rule would necessarily be modified to the extent that either member of a firm could do any act within the scope of the agency, the same as he could perform any other partnership act. By

appointing a partnership firm it would be implied that the authority was joint and several, but upon dissolution of the firm such an agency would cease. This is the necessary result of the principles alluded to. The principal would not be bound by the act of a surviving member of a firm, because he had never appointed him to act nor agreed to be responsible for his acts, and the latter could incur no obligation against the deceased member or his representatives."

The case of *Larson v. Newman*, 19 N. Dak. 153, (121 N. W. Rep. 202,) presents a state of facts almost identical with that of the case at bar. In that case Newman entered into a written contract with a firm consisting of three co-partners, who were engaged in the business of land agents, to sell for him a tract of land which he owned in North Dakota. Thereafter the partnership was dissolved, one of the partners continuing in the same line of business. The partner who thus continued in the business entered into a contract with Larson for the sale of Newman's land, relying upon the agency contract theretofore entered into between Newman and the partnership. Newman refused to ratify the sale and execute a deed, and Larson brought suit for specific performance. The North Dakota court held that whatever authority was conferred upon the partnership by the agency contract was terminated upon its dissolution and that the former member of the firm who contracted for the sale of the land had no further power under the agency contract. We concur in the reasoning in that case. The authority given John P. Foerster & Co. to contract for the sale of the lots of appellee ceased immediately upon the dissolution of that firm, and John P. Foerster had no further authority, either in his own name or in the firm name, to act under the agency contract of September 9, 1909, and his contract with appellant for the sale of 51½ lots was not binding upon appellee.

The contract of September 9, 1909, contained the following provision: "The conditions of this contract shall be

binding on the heirs, executors, administrators, assigns and successors of the respective parties hereto." It is not necessary for us to determine the effect of this provision of the contract. No attempt was made during the existence of the partnership to make an assignment of the contract, and, as we have seen, the dissolution of the partnership operated immediately to revoke the agency. Upon the dissolution of a partnership it immediately ceases to exist except for the purpose of winding up the business of the firm. There can be no successor to a partnership, and there is no question of survivorship involved, either under the terms of the contract itself or by reason of the manner in which the dissolution was effected.

The decree of the superior court is affirmed.

*Decree affirmed.*

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THE PEOPLE *ex rel.* Harvey J. Nourie *et al.* Appellants, *vs.*  
JOSEPH H. PELTIER *et al.* Appellees.

*Opinion filed December 16, 1914.*

1. ELECTIONS—*section 270 of the School law does not authorize women to vote upon question of organizing a high school district.* While section 270 of the School law authorizes women having the qualifications therein prescribed to vote for school officers who are not named in the constitution, yet it does not authorize them to vote upon the question of organizing a high school district.

2. SAME—*Women's Suffrage act does not authorize women to vote upon proposition to organize high school district.* The provision of the Women's Suffrage act of 1913 that women may vote upon all questions or propositions submitted to a vote of the electors of the municipalities mentioned therein or other political divisions of the State, does not authorize women to vote upon the question of organizing a high school district under section 6 of the Township High School act of 1911, since school districts are not among the municipalities mentioned in the act of 1913 and do not become political subdivisions of the State until after organization.

3. QUO WARRANTO—*petition for leave to file information must allege facts.* A petition for leave to file an information in the na-

ture of *quo warranto*, the real purpose of which is to contest an election to organize a high school district upon the ground that women were allowed to vote, must allege the total number of votes cast, the number for and against the proposition and the number of votes cast by women, and it is not sufficient to allege the conclusion that the election would have been against organization if women had not been allowed to vote. (*Conway v. Sexton*, 243 Ill. 59, applied.)

APPEAL from the Circuit Court of Iroquois county; the Hon. FRANK L. HOOPER, Judge, presiding.

J. W. KERN, State's Attorney, (KAY, PERRIGO & KAY, and PALLISSARD & BENJAMIN, of counsel,) for appellants.

C. G. HIRSCHI, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The State's attorney of Iroquois county presented to the circuit court of that county his petition for leave to file an information in the nature of *quo warranto* requiring the appellees to answer to the court by what authority they claimed to hold and exercise the franchise of a high school district as president and board of education. The court denied the prayer of the petition and dismissed it.

The facts from which leave was asked were set forth in an affidavit of Harvey J. Nourie, which stated that he and the other relators were citizens and legal voters of Iroquois county and owners of land and tax-payers in the territory which was alleged to have been organized as a high school district in pursuance of an affirmative vote at an election held on May 23, 1914; that at the election the votes of more than ninety women were received and counted and if those votes had not been received and counted the proposition would have been lost, and that the territory described in the affidavit did not contain within its boundaries a school district having a population of 1000 or more and

not exceeding 100,000. The lands composing the territory were described in the affidavit and were situated in several school townships and were not confined to any existing school district.

The proceeding to organize the high school district was under section 6 of the act to authorize the organization of such districts, in force July 1, 1911, (Laws of 1911, p. 505,) which provides that the inhabitants of any contiguous and compact territory, whether in the same or different townships, upon a petition signed by at least fifty legal voters and an affirmative vote in such territory, may establish, in the manner provided by the act, a township high school for the benefit of the inhabitants of the territory described in the petition. Section 270 of the School law provides that women having the qualifications therein specified shall be entitled to vote at any election held for the purpose of choosing any school officer, and by virtue of that section women may vote for any school officer not named in the constitution. (*Plummer v. Yost*, 144 Ill. 68.) That section does not authorize women to vote upon the proposition whether certain territory shall be organized into a school district, and whether it was entirely consistent for the General Assembly to permit women to vote for the officers of a district when they are not permitted to vote whether there shall be a district is a question with which the courts are not concerned. The only other act conferring upon women the right to vote at elections is the act of 1913. (Laws of 1913, p. 333.) A provision of that act which it is argued confers the right is, that women may vote upon all questions or propositions submitted to the vote of the electors of the municipalities mentioned therein or other political divisions of the State. School districts are not mentioned in the act, and the right to vote whether territory shall be organized into a high school district depends upon the question whether such territory constitutes a political division of the State. Whether a high school district is a municipal

corporation or *quasi* municipal corporation or not, it is a political division of the State, because the territory comprising it is organized for the public advantage and the exercise of governmental functions by the support of free schools and levying taxes for such support. (31 Cyc. 908.) It does not become such political division, however, until it has been organized and is capable of exercising such functions. Women were not entitled to vote at the election in question by virtue of the act of 1913. They were legal voters in the territory at some elections and on certain questions, but the provision that the question of organizing high school districts shall be submitted to a vote of the people at an election means submission to voters who are entitled to vote upon the question submitted. (*Beverly v. Sabin*, 20 Ill. 357; *Heuser v. Harris*, 42 id. 425.) Women were not entitled to vote on the question of organizing a high school district, and their votes should not have been received and counted.

While women were not entitled to vote, the court did not err in refusing leave to file the information, because the affidavit presented did not show facts requiring the court to grant the leave. A petition must allege facts and not conclusions, and the affidavit presented to the court did not show how many votes were cast at the election, how many were in favor of the proposition submitted or how many against it. For anything that appears in the affidavit there might have been a majority of more than ninety votes in favor of the proposition. It did not state as a fact that any women, or how many women, voted for the proposition, and the court was not called upon to inaugurate an exploring expedition to ascertain facts not alleged. The real purpose and effect of the proceeding were to contest the election, and the rule as stated in *Conway v. Sexton*, 243 Ill. 59, is applicable. The petitioner there alleged that votes which should have been counted for him were wrongfully counted for other candidates, and that if the votes so

wrongfully counted for other candidates had been properly counted for him he would have been elected. It was held that the petition was insufficient because there was nothing in it to show how many votes were received by any of the candidates. The suggestion that if enough illegal votes should be found to change the result the election would be void even if it should be impossible to determine how many illegal votes were cast on each side, if considered sound, would not aid the petition, because the petition does not show, by statements of fact as to the number of votes, that ninety votes would have changed the result.

The judgment is affirmed.

*Judgment affirmed.*

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THE PEOPLE *ex rel.* Arthur Tarman, County Collector, Appellee, *vs.* THE CAIRO, VINCENNES AND CHICAGO RAILWAY COMPANY, Appellant.

*Opinion filed December 16, 1914.*

1. TAXES—*Roads and Bridges act of 1913 changes method of certifying the hard roads tax.* While such of the provisions of the Hard Roads act of 1883 as are retained unchanged in the Roads and Bridges act of 1913 must be regarded as having been continuously in force notwithstanding the express repeal of the Hard Roads act, yet the provision as to certifying the tax has been changed by the act of 1913 so as to require the highway commissioners to certify the tax directly to the county clerk, and unless the tax is certified in such manner it is invalid.

2. The question of the validity of the road and bridge taxes here involved is controlled by the decision in *People v. Illinois Central Railroad Co.* (*ante*, p. 429.)

APPEAL from the County Court of Clark county; the Hon. H. R. SNAVELY, Judge, presiding.

P. J. KOLB, (L. J. HACKNEY, and FRANK L. LITTLETON, of counsel,) for appellant.

E. D. JONES, State's Attorney, J. W. GRAHAM, and ARTHUR POORMAN, for appellee.

Mr. JUSTICE COOKE delivered the opinion of the court:

The county collector of Clark county made application to the county court of that county for judgment and order of sale against the property of appellant for various delinquent taxes. Appellant objected to the road and bridge taxes of the towns of Wabash, Marshall, Darwin and York, on the ground that when the present Road and Bridge act went into effect on July 1, 1913, those townships were under what is commonly known as the labor system, and that appellant had paid in labor in the several road districts in said townships the tax extended to the amount of the several sums objected to. The road and bridge tax of the town of York was objected to upon the ground that the tax was levied under section 58 of the present Road law to pay damages agreed upon, allowed or ordered for the laying out, widening, altering or vacating roads and for ditches to drain roads, whereas no such damages had been allowed or agreed upon. The hard road tax in the town of Wabash, amounting to \$592.11, was also objected to. Each of these objections was overruled and judgment and order of sale entered.

The question raised by the objection to the road and bridge taxes of the towns of Wabash, Marshall and Darwin, and to \$131.28 of the road and bridge taxes of the town of York, being the amounts theretofore paid in labor, has been determined at the present term in *People v. Illinois Central Railroad Co.* (*ante*, p. 429,) and for the reasons there given the objections were properly overruled.

It is conceded that there is no proof in the record as to whether damages had been agreed upon in reference to the road and bridge tax of the town of York in the sum of \$88.40, which was levied under section 58 of the present Road and Bridge act, and that the objection was prop-



erly overruled, but it is insisted that an improper judgment was entered for this and the other taxes. The contention is that the judgment ordered the sale of all the property of the railroad company within Clark county to satisfy the delinquent taxes levied by only a portion of the taxing districts in that county upon the property of appellant within such taxing districts. We are of the opinion that the judgment is not subject to the criticism made against it, as it is apparent that that portion of appellant's property included in each taxing district was ordered sold for the tax levied within such district.

The hard road tax in the town of Wabash was objected to upon the ground that the tax was extended upon a certificate of the town clerk dated September 2, 1913, stating that at the annual town meeting held on the first day of April, 1913, a special tax of one dollar on each \$100 assessed valuation was levied for the purpose of constructing and maintaining certain gravel roads, and it is urged that such certificate did not constitute proper or lawful authority for the extension of said tax by the county clerk. The election at which the special tax for constructing and maintaining the gravel road was voted, and the proceedings incident thereto, were had under the Hard Roads act approved June 18, 1883, in force July 1, 1883. This act was expressly repealed, without any saving clause, by an act to revise the law in relation to roads and bridges approved June 27, 1913, in force July 1, 1913, and which has been heretofore referred to as the present Road and Bridge act. The Hard Roads act of June 18, 1883, was incorporated in the present law almost verbatim, about the only material change being, that whereas under the old act the commissioners of highways were required to levy a tax in accordance with the vote and certify the same to the town or district clerk, who, in turn, was required to certify the amount voted to the county clerk, under the present law it is the duty of the commissioners of highways to levy an annual

tax in accordance with the vote and certify the same directly to the county clerk and cause a copy of such levy to be filed in the office of the town or district clerk. It then becomes the duty of the county clerk to cause the levy thus certified to him to be extended on the tax books for the current and each succeeding year, as stated in the certificate so filed with him. Where a statute is expressly repealed but a portion or all of it is re-enacted in the repealing statute, the re-enactment neutralizes the repeal so far as the provisions of the old law obtain in the new one, and as to the portions unchanged in form or substance the repealing act is a mere continuation of the original act. (Section 2 of the act in relation to construction of the statutes; *White Sewing Machine Co. v. Harris*, 252 Ill. 361; *Merlo v. Coal and Mining Co.* 258 id. 328.) The vote had under the old law upon the proposition to levy a tax for hard roads in the town of Wabash was therefore binding under the new act and was sufficient authority for the commissioners of highways to make a levy and certify the same. The levy must be made and certified, however, according to the provisions of the new act. The act in force July 1, 1913, provided that this levy should be certified directly to the county clerk and should be his authority for the extension of the tax. The only authority for the extension of the hard roads tax by the county clerk is the certificate of the commissioners of highways, and without such certificate any attempt to extend this tax is illegal and void. The certificate of the town clerk was not a compliance with the statute and did not warrant the county clerk in extending the tax.

The judgment of the county court overruling the objections to the road and bridge taxes of the towns of Wabash, Marshall, Darwin and York is affirmed. The judgment is reversed as to the hard road tax of the town of Wabash and the cause is remanded, with directions to sustain the objection to that tax.

*Reversed in part and remanded, with directions.*

JAMES C. BOWEN *et al.* Appellees, *vs.* OSCAR BOWEN *et al.*  
Appellants.

*Opinion filed December 16, 1914.*

1. JUDICIAL SALES—*master should offer land in parcels if same is susceptible of division.* It is the duty of the master in chancery in making a sale to offer the land in parcels if the same is susceptible of division, and if he fails to do so and the land is thereby sold for an inadequate price the sale will be set aside upon a proper showing.

2. SAME—*when one objecting to confirmation of report of sale must make proof.* It is not sufficient for a party to assert, by way of objection to the confirmation of the report of sale, that the lands were susceptible of division and were sold for an inadequate price because they were not offered in separate tracts, but he must sustain his charges by proof.

3. SAME—*some showing must be made even though rights of minor are involved.* While the rules with respect to upholding judicial sales are relaxed where the interest of a minor is involved, yet there must be some showing before the court will be warranted in setting aside a sale.

APPEAL from the Circuit Court of Vermilion county;  
the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding.

A. B. DENNIS, for appellants.

H. A. SWALLOW, for appellees.

Mr. JUSTICE COOKE delivered the opinion of the court:

The appellants, Oscar Bowen, Goldie Bowen Henning and Fred Bowen, were defendants to a bill for partition in the circuit court of Vermilion county. A decree for partition was entered and commissioners appointed, who reported the lands indivisible. The master thereupon sold the lands, pursuant to a decree of sale, to appellees, who were the complainants in the bill. On June 16, 1914, the master filed his report of sale, and on the same day Oscar Bowen and Goldie Bowen Henning, two of the appellants,

who were each entitled to a distributive share of the proceeds of the sale, filed their motion to set aside the report of the commissioners, and also filed exceptions to the master's report of sale and objected to the confirmation of the sale for the following reasons: That the master did not offer any part of the lands for sale in parcels although the same is susceptible of being divided into four parts, but that the same was sold *en masse*; that parties were present at the sale for the purpose of bidding upon different parts of the land who did not care to buy all the property, naming the parties who were alleged to be so present; that these parties would have bid for the different tracts, had the land been offered in parcels, sums aggregating about \$4000 more than the amount for which the property was sold. No affidavits were filed in support of the exceptions to the report of sale and the objections to its confirmation, nor in support of the motion made on the same day to set aside the report of the commissioners upon the ground that the premises were divisible, and no testimony was taken as to these matters. The court thereupon, on June 17, overruled the motion to set aside the report of the commissioners and the exceptions to the report of sale and entered an order approving the report of sale and allowing an appeal to Oscar Bowen and Goldie Bowen Henning upon the filing of a bond in the sum of \$300 within thirty days, to be approved by the clerk. Thereafter, during the same term of court, and on July 10, the three appellants joined in a motion to set aside the order of the court theretofore entered on June 17 approving the report of the commissioners and the order approving the master's report of sale and allowing an appeal to Oscar Bowen and Goldie Bowen Henning, and asked leave to file exceptions to the report of the commissioners and to the master's report of sale, which exceptions, and affidavits in support of the same, were attached to and made a part of the motion. The court denied this motion and allowed an appeal from the

order upon the appellants giving bond in the sum of \$300 within thirty days from June 17, 1914, to be approved by the clerk. The present appeal was perfected from the order of June 17 denying the motion of Oscar Bowen and Goldie Bowen Henning to set aside the report of the commissioners and overruling the exceptions to the master's report of sale.

It is the duty of the master in making a sale to offer the land in parcels if the same is susceptible of division. If the master fails in the performance of his duty in this regard and the lands are thereby sold for an inadequate price the sale will be set aside upon a proper showing. It is not sufficient for the objectors to merely assert, by way of objection to the report, that the lands were susceptible of division and not having been offered in separate tracts or parcels an inadequate price was thereby realized from the sale. These charges must be sustained by proof. Appellants having failed to offer any proof in these particulars the court properly overruled the exceptions and confirmed the master's report of sale.

No showing whatever was made in support of the motion to set aside the report of the commissioners, and for that reason that motion was properly denied.

It is contended that as appellant Fred Bowen is a minor the court will require less proof of irregularity in the making of the sale than in a case where the parties are all adults. While it is true that the rules are relaxed in the case of minors, still there must be some showing before the court is warranted in taking action. In this case there was no showing whatever.

The affidavits filed in support of the motion of July 10 cannot be considered on this appeal as they were not before the court for consideration at the time the order herein appealed from was entered.

The decree of the circuit court is affirmed.

*Decree affirmed.*

JOHN F. DEVINE, Admr., Appellant, vs. THE NORTHWESTERN ELEVATED RAILROAD COMPANY, Appellee.

*Opinion filed December 16, 1914.*

1. APPEALS AND ERRORS—*when refusal to permit proper questions to be answered is not harmful.* Refusal of the court to permit proper questions to be answered is not harmful, where the facts sought to be proved by such questions are established by testimony of other witnesses which is in no way disputed.

2. INSTRUCTIONS—*instruction need not define "due and proper care and caution."* An instruction in an action for damages for wrongfully causing the death of the plaintiff's intestate, which requires the jury, in order to return a verdict for the plaintiff, to find that the deceased was in the exercise of due and proper care and caution for her own safety at and just before the accident, is not erroneous because it does not define the words "due and proper care and caution."

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN McNUTT, Judge, presiding.

O'DONNELL, DILLON & TOOLLEN, for appellant.

ADDISON L. GARDNER, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was an action on the case brought in the superior court of Cook county by appellant, as administrator of the estate of Josephine Welter, deceased, against appellee, for wrongfully causing the death of appellant's intestate. The jury returned a general verdict in favor of appellee, and also returned, in answer to an interrogatory submitting that question, a special finding that the deceased was not "in the exercise of due and proper care and caution for her own safety at the time of the accident which resulted in her death." The judgment entered on such verdict was

affirmed on appeal to the Appellate Court. The case is brought here on a certificate of importance.

The deceased met her death on Monday morning, October 11, 1909, shortly after twelve o'clock midnight. She had been working for some months previous to the accident as a domestic for the Huston family, at 1135 Lunt avenue, Chicago. The Sunday night previous to her death she had been out and was returning in company with a young man named Nicholas Sweig. As they were walking east on Lunt avenue a few minutes after twelve o'clock they came to the double-track railroad then in use by the appellee company. The railroad at this point runs north and south. At Morse avenue, the next street south of Lunt, is a station, the platform of which extends north to within 125 feet of Lunt avenue. Gates were placed on each side of the track at the Lunt avenue crossing, consisting of a long arm which closed the street and a short arm which closed the sidewalk, when down. These arms were hung on iron posts which stood in the street a short distance from the edge of the sidewalk, and the two long arms met in the middle of the street when the gates were down. For the full space of the sidewalk and for some little distance out into the street foot passengers were prevented from going under the short bar of the gate by lattice work which was suspended from that bar, making it impossible to go under even by stooping. Just south of Lunt avenue, between the railroad tracks, was a tower, in which was stationed a man who had charge of the crossing and raised and lowered the gates. The railroad tracks in this part of Chicago across these streets and for some distance north and south are laid on the surface of the ground at grade with the streets. The night was dark and a misty rain was falling. As the deceased and her companion approached the railroad from the west on Lunt avenue they found the crossing gates down and a south-bound passenger train, consisting of several cars, passing over Lunt avenue crossing, on the east track.

There is some conflict in the evidence as to just what happened after this train had passed. Sweig testified that immediately after it had passed the gates began to rise, and when a little over half way up the deceased stooped down a little and passed under the gate and onto the track, where she was struck by a car coming north on the west track and killed. It is clear from his testimony that he was not watching the deceased at the time she started forward to cross the railroad tracks, and he does not claim to have seen her until just as she was passing under the gate, when he tried to stop her but failed. His testimony given at the inquest does not accord in every particular with that given at the trial. This may be in part accounted for by the fact that he testified through an interpreter. The motor-man on the car that struck the deceased testified that he first saw her when she was about ten feet from the car, coming up from under the long arm of the gate,—the arm over the street,—just rising up from a stooping position; that she took about two steps before the car hit her, and that the gates were down when he passed the crossing. The towerman at this crossing did not see the deceased or her companion and did not know of the accident until a short time after it had happened. He testified that he did not raise the gates after the passenger train went through and that they were down at the time that the north-bound car crossed Lunt avenue. Morse avenue (Rogers Park station) is a regular stop for passenger trains going in either direction. Only occasionally a single car may go through without making a stop. The north-bound car in question did not make the stop and had no one on it except the motor-man and conductor.

No positive evidence was introduced as to the rate of speed at which this car was traveling at that time. The conductor testified that he first noticed that the brakes were set when they reached the crossing at Lunt avenue. There is testimony tending to show that the car went approxi-



mately 656 feet north of that street before it was brought to a full stop. The motorman was asked by the appellant's counsel, "When did you apply the brakes?" and, "Did you stop at the street just preceding?"—meaning Morse avenue. The towerman was also asked, on cross-examination, "And this car went on north and passed Greenleaf avenue, did it not?"—Greenleaf avenue being the second street north of Lunt. To all of these questions the court sustained objections. Conceding for the purposes of this case that the court should have permitted these questions to be answered, we cannot see how appellant was injured, as the facts that appellant's attorneys were trying to prove by securing answers to these questions were proved by other witnesses whose testimony was in no way disputed.

Counsel for appellant further insist that the trial court committed error in the giving of certain instructions for appellee, especially instruction 14, which told the jury, among other things, that in order to find a verdict for appellant they must believe, from the evidence, that the deceased was in the exercise of "due and proper care and caution for her own safety, as defined in these instructions, at and just before the time of the accident complained of." The argument especially criticises the using of the words "due and proper care and caution" without defining what those words mean, counsel insisting that the jury might be misled as to their meaning unless further defined. With this we cannot agree. The words are not technical. They are in common use. To require the definition of all words or expressions used in instructions would often tend to confuse rather than aid the jury. If it is necessary to explain such terms, might it not be equally necessary to explain the terms used in the explanation? An instruction using the words "due and proper care" was held, after a lengthy discussion, not misleading in *Schmidt v. Sinnott*, 103 Ill. 160. To uphold appellant's contention would be to overrule that case. The criticism by counsel of the use of the terms "negligence"

and "due and ordinary care" in the instructions comes within the same line of reasoning. As was said in the case last referred to, while it might have been proper for the court, on its own motion or on the application of either of the parties, to have given an instruction specifically defining these terms as applicable to the case on trial, there was no necessity for so doing unless such an instruction had been asked. It is hardly to be expected that instructions will be precisely accurate in all particulars. It has repeatedly been held by this court that it is sufficient if they are substantially accurate. *Schmidt v. Sinnott*, *supra*; see, also, *Beard v. Maxwell*, 113 Ill. 440; *Calumet Iron and Steel Co. v. Martin*, 115 id. 358; *Chicago and Eastern Illinois Railroad Co. v. White*, 209 id. 124; *Carlin v. Grand Trunk Western Railway Co.* 243 id. 64.

Certain other questions are raised incidental to those already considered, which, in view of the conclusions reached, we are not required to discuss.

We find no error in the record that would justify the reversal of the cause. The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*



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